Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

STEVE MIDDLETON,

Petitioner,

vs.

BALL-FOSTER GLASS CONTAINER COMPANY, L.L.C.,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Does the Court's holding in *Toyota Motor Mfg., Ky., Inc. v. Williams*, 534 U.S. 184, 122 S.Ct. 681, 151 L.Ed.2d 615 (2002) relegate employees who are "regarded as" being disabled by their employers following an on-the-job injury and resultant disability to a position of no protection when the employee desires to work and the employer thwarts the return to work?
2. Is the Fifth Circuit's reliance on *Toyota Motor Mfg., Ky., Inc. v. Williams*, 534 U.S. 184, 122 S.Ct. 681, 151 L.Ed.2d 615 (2002) erroneous in a claim involving a perceived disability by the employer under the Americans With Disabilities Act when it is the employer who claims the employee cannot perform various jobs and prohibits the employee from working even though the employee and the employee's physician maintain that the employee is otherwise qualified?
3. What constitutes good faith participation by the employer in the "interactive process" required under the Americans With Disabilities Act in determining whether a reasonable workplace accommodation can be made for an employee regarded as being disabled by his employer?
4. Do the Opinions of the District Court and the Fifth Circuit transform the interactive process to effectuate a reasonable workplace accommodation under the Americans With Disabilities Act from a process to prevent discrimination to a means to effectuate discrimination?
5. Does this Court's holding in *Toyota Motor Mfg., Ky., Inc. v. Williams*, 534 U.S. 184, 122 S.Ct. 681, 151 L.Ed.2d 615 (2002) remove every work-related injury and resultant disability from the protection afforded to qualified individuals with a disability?

QUESTIONS PRESENTED FOR REVIEW – Continued

6. Does a physical impairment which arises from a work-related injury and substantially limits working ability more than other major life activities qualify as a "disability" under the American With Disabilities Act?

7. Do the Opinions of District Court and the Fifth Circuit in *Middleton* metamorphasize Fed. R. Civ. P. 56 to the extent that all of the nonmovant-employee's controverting evidence may be rejected or considered in the light most favorable to the movant-employer in an employment discrimination case?

8. Is an employee a qualified individual with a disability under the Americans With Disabilities Act if the employee is limited in his ability to lift as a result of a work related injury or, stated differently, is a lifting restriction, *as a matter of law,* not a substantial limitation on major life activity as held by the Fourth, Fifth and Eighth Circuits?

PARTIES TO THE PROCEEDING

The following is a list of all parties to the proceedings in this case in the United States Court of Appeals for the Fifth Circuit:

1. Steve Middleton, Appellant-Petitioner
2. John E. Wall, Jr., Attorney for Appellant-Petitioner
3. Ball-Foster Glass Container Company, L.L.C., Appellee-Respondent
4. Richard M. Kobdish and the law firm of Fulbright & Jaworski, Attorneys for Appellee-Respondent

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit in case no. 01-10329 affirmed the decision of the United States District Court for the Northern District of Texas, which granted summary judgment in favor of the Respondent on all claims. Following Oral Argument on December 6, 2001, the Fifth Circuit issued a six-sentence unpublished Opinion dated January 16, 2002 and reprinted here as Appendix A. The district court's February 2, 2001 Final Judgment and Memorandum Opinion and Order are printed here as Appendix B and Appendix C, respectively.

STATEMENT OF JURISDICTION

This Petition for a Writ of Certiorari seeks review of the opinion of the United States Court of Appeals for the Fifth Circuit entered on January 16, 2002.

Jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1). This Petition for Certiorari is timely filed pursuant to 28 U.S.C. § 2101(c).

APPLICABLE STATUTES

1. The statutes applicable to this case are as follows:

Americans With Disabilities Act of 1990:

General Rule

> No covered entity shall discriminate against a qualified individual with a disability

because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and/or other terms, conditions, and privileges of employment. 42 U.S.C. § 12112(a).

As used in subsection (a), the term discriminate includes . . . (5)(A) not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such covered entity. . . . 42 U.S.C. § 12112(b).

Disability

The term "disability" means, with respect to an individual –

(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual;

(B) a record of such an impairment; or

(C) being regarded as having an impairment. 42 U.S.C. § 12102(2).

Qualified Individual with a Disability

The term "qualified persons with a disability" means an individual who, with or without reasonable accommodation, can perform the essential functions of the employment position that such an individual holds or desires. 42 U.S.C. § 12111(8).

Reasonable Accommodation

> The term reasonable accommodation may include . . . (b) job restructuring, part time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustments or modification of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations for individuals with disabilities. 42 U.S.C. § 12111(9).

Undue hardship

> The term "undue hardship" means an action requiring significant difficulty or expense, when considered in light of the following factors (i) the nature and cost of the accommodation needed; (ii) the overall financial resources of the facility involved in the provision of the reasonable accommodation, the number of persons employed at the facility, the effect on expenses and resources, or the impact otherwise of such accommodation upon the operation of the facility; (iii) the overall financial resources of the covered entity, the overall size of the business of a covered entity with respect to the number of its employees, the number, type and location of its facilities; and (iv) the type of operation or operations of the covered entity, including the composition, structure, and functions of the workforce of such entity, the geographic separateness, administrative or fiscal relationship of the facility in question to the covered entity. 42 U.S.C. § 12111(10).

STATEMENT OF THE CASE

Basis for Federal District Court Jurisdiction:

Petitioner, Steve Middleton ("Middleton") brought suit against his former employer, Respondent, Ball-Foster Glass Container Company. L.L.C. ("BFG"), claiming violations of the Americans with Disabilities Act of 1991, 42 U.S.C. § 12101 *et seq.* and the Anti-retaliation provision of the Texas Workers' Compensation Act, Tex. Lab. Code Ann. § 451.001. Jurisdiction was proper in the United States District Court for the Northern District of Texas pursuant to 28 U.S.C. § 1331 and 28 U.S.C. § 1367.

Facts Material to Consideration of the Questions Presented:

Steve Middleton began working for BFG in December 1988. (R 716) During his tenure, Middleton performed a variety of jobs, including Floor Person/Apprentice Operator, pallet loader, box maker, line attendant, auditor and virtually all of the "cold end" jobs.[1] *Id.*

On May 30, 1996, Middleton injured his back on the job. (R 717) Although injured, he did not miss time from work or seek medical treatment until August 1996. *Id.* At that time, company doctors, Dr. Bousquet and Dr. Garrison, initially evaluated Middleton's back injury. *Id.* During the initial visits, Dr. Garrison of BaylorWorx (a

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[1] The plant was divided into the "hot end" and the "cold end". "Hot end" jobs involved forming molten glass into bottles using machines. "Cold end" jobs involved inspecting, packing and storing bottles. (R 716)

medical clinic where BFG employees are sent for treatment of on-the-job injuries) stated that an MRI was an expensive test and that if Middleton's back injury was serious enough to warrant an MRI, Middleton would have been unable to walk into Garrison's office. (R 717, 743) Dr. Garrison released Middleton to return to work at full duty on September 3, 1996. *Id.*

On September 7, 1996, a few days after resuming work, Middleton was treated for back pain at the local hospital emergency room and was referred to Dr. Bousquet for an MRI. *Id.* Dr. Bousquet excused Middleton from work and, after the MRI, Middleton was diagnosed with an 11-millimeter herniated lumbar disc at the L4-L5 level. *Id.* Middleton underwent surgical decompression of the affected disc on January 15, 1997. (R 718)

In September 1996, Middleton filed a workers' compensation claim for his May 30, 1996 injury, and thereafter received workers' compensation benefits. *Id.* Middleton was later assigned a 20% impairment rating resulting from the injury. *Id.*

In December 1997, Middleton performed an FCE (Functional Capacity Evaluation) at BaylorWorx. *Id.* Then, in January 1998, after being released for full duty by Dr. Bousquet, Middleton returned to his Floor Person/ Apprentice Operator position. *Id.* After returning to work, Middleton experienced back pain and swelling. *Id.* Middleton changed doctors and began seeing Dr. Osborn, who diagnosed post-laminectomy syndrome. (R 518, 719) Dr. Osborn initially indicated that Middleton would need to change jobs and placed him on permanent light duty

restrictions on March 27, 1998, including no lifting over 25 pounds or excessive bending, pushing and pulling. *Id.*

On March 27, 1998, Middleton provided Julia Kirchner, BFG Human Resource Manager, his work restrictions from Dr. Osborn. (R 719) Kirchner sent Middleton home and stated that she would call him when a job suited to his condition was open. *Id.*

Even with the restrictions, in March 1998, there were available jobs which Middleton could have performed, such as a repack job or Line Attendant, both "cold end" jobs. *Id.* Both Middleton and Dr. Osborn maintained ability to do those jobs without accommodation. The repack job involved bottle inspection, and the Line Attendant job involved keeping the lines clear, sweeping glass and floor cleaning. *Id.* Middleton was not offered either job or any other job, either with or without reasonable accommodation. *Id.*

Because Middleton was not permitted to return to work by BFG, on account of his disability and financial need, Middleton then sought benefits through BFG's disability plan. (R 720) Middleton completed a benefits form and had Dr. Osborn complete the medical portion of this form. (R 579-80, 720) Dr. Osborn indicated that Middleton was not expected to return to his former job because BFG had refused to return Middleton to that position. (R 580, 803-04) Although claiming on this form that there was no work available due to his restrictions, Kirchner stated that the validity of the claim should be questioned because there were other types of work Middleton could perform. (R 579-80)

According to Kirchner, Middleton was denied disability benefits because he had not been employed for ten years. (R 720) Middleton did inform Dr. Osborn that he was not eligible for disability benefits, but did not ask Dr. Osborn to change his restrictions because of that. *Id.* Kirchner maintained that she advised Middleton that he was not eligible for disability benefits sometime prior to May 8, 1998. Nevertheless, on May 8, 1998, Kirchner authored a memo that she did not learn of Middleton's ineligibility until May 8, 1998. (R 589, 601)

On May 4, 1998, Dr. Osborn examined Middleton and revised his restrictions from permanent to temporary (for 8 weeks) effective May 8, 1998.[2] (R 600, 720, 764-65) Dr. Osborn also determined that Middleton would not need to change jobs. (R 600) The revised restrictions included no lifting over 25 pounds and no excessive bending, heavy pushing or pulling. (R 600) With these restrictions, Middleton would have been able to perform his previous Apprentice Operator job with reasonable accommodations, such as having one of the Upkeeps assist him if he needed assistance lifting or changing the molds. (R 720) Middleton also could have been placed in a lighter job such as repack or Line Attendant. *Id.*

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[2] In May 1998, Middleton also began seeing Richard Raughton, D.O., for treatment of his back, and continues to see him on an as needed basis (approximately every two months). Dr Raughton opined that Middleton suffers from status post lumbar laminectomy pain, and is substantially limited in major life activities as a result of his impairment, including activities requiring excess driving, walking, jogging and lifting weights. (R 790-94)

Middleton again presented his work release to Kirchner, who again refused to permit him to return to work. *Id.* On this matter, Kirchner testified that:

> she "thought it was unordinary that he [Middleton] had this miraculous change in condition, that it was now temporary. Among other things."

(R 735) Kirchner elaborated that she was concerned about the updated medical release, and that the temporary restriction raised a "special flag" because she claimed to have told Middleton that only employees with temporary restrictions were given light duty. *Id.* When Kirchner received the May 8th restrictions from Dr. Osborn, which were changed from permanent to temporary, she exclaimed "Oh, what an interesting coincidence." (R 736) Kirchner, however, did not voice her alleged concerns to Dr. Osborn or otherwise ask him to explain the reason for the change in Middleton's status. (R 803-06)

Dr. Osborn provided Middleton work releases for temporary light duty on June 25, 1998 (for six weeks) and again on July 27, 1998 (for eight weeks). (R 602-03, 720) Middleton presented these work releases to Kirchner; however, BFG continued to refuse to allow Middleton to return to work. (R 720)

Almost five months after Middleton's initial release to return to work, in a letter dated August 10, 1998, Kirchner wrote to Dr. Osborn and asked him to identify certain jobs Middleton could perform based on job descriptions which *she* provided. (R 604) The job descriptions provided were detailed and included duties and a "job strength" inventory. (R 605-18) Kirchner did not ask

for details from Dr. Osborn supporting his opinions as to any job he specified. *Id.*

As requested, on August 20, 1998, Dr. Osborn submitted a list of at least five to six "cold end" jobs which Middleton could have performed with his restrictions. (R 619) Rather than permitting Middleton to return to one of these jobs, Kirchner wrote Dr. Osborn, and despite not previously requesting details, now claimed that she needed a detailed analysis of Middleton's physical abilities and another FCE from BaylorWorx. (R 620) Middleton next contacted Kirchner to discuss what he needed to do to return. (R 721, 726-31) Kirchner admitted that Osborn had given her the answers she had asked for, but claimed she still wanted more details to make sure Middleton "could do every single thing in that job, and not just the general well, yeah, he can do it. . . . " (R 729)

Because Kirchner was now requesting another FCE, Middleton called the workers' compensation insurance carrier and inquired if BaylorWorx had to perform the FCE or could some other entity perform the analysis. (R 721) It was Middleton's understanding from this conversation that it did not matter where he had the FCE performed, and that the computerized FCE machine at Sargent Rehabilitation Clinic was state of the art. *Id.* Middleton then called Kirchner and asked her if the FCE could be performed at Sargent Rehabilitation. *Id.* Middleton did not want BaylorWorx to perform the FCE because it employed the company doctor that had previously released him to return to full duty without performing an MRI when he had a herniated disk. *Id.* Also, BaylorWorx had only a manual FCE. (R 721, 743) According to Kirchner, she contacted the workers' compensation

insurance carrier about having the FCE done at Sargent's and was informed that an FCE is an FCE. (R 737, 747) Kirchner approved Middleton's request to have Sargent's perform the FCE. (R 721, 747)

On September 23, 1998, Middleton had the FCE performed by Sargent. (R 621, 721) Dr. Osborn signed the FCE and it was submitted to Kirchner. (R 622) As a result of the FCE, Dr. Osborn found Middleton capable of performing the same five to six "cold end" jobs he had previously approved. (R 622, 721)

Despite having the new FCE performed and Dr. Osborn's consistent opinion that Middleton was capable of returning to work, Kirchner wrote to Dr. Osborn in November 1998 and told him she needed further clarification of the FCE results before she could return Middleton to work. (R 629, 721) Dr. Osborn then agreed to make a tour of the plant to observe the jobs. (R 738-41, 766-68) Kirchner had represented during a grievance meeting that to return Middleton to work, BFG just needed Dr. Osborn to observe the jobs at the plant that Dr. Osborn said Middleton could perform to be sure he could safely perform them. (R 722, 773-76)

After touring the plant, Dr. Osborn concluded that Middleton could return to work as a Floor Person/ Apprentice Operator if he did not have to change the molds. (R 630, 722) Dr. Osborn also stated that Middleton could perform various "cold end" jobs (lehr sampler, repack and auditor) if he did not have to lift heavy rolls of plastic or perform excessive bending. *Id.* Middleton could also still have performed the Line Attendant job. (R 722) Dr. Osborn later testified that after touring the plant,

he believed Middleton could perform the Floor Person job because it was a lighter job than he had envisioned (and it became lighter after he learned that the molds did not have to be removed intact[3]). (R 801-03)

Still allegedly not satisfied with Dr. Osborn's release after the plant tour, Kirchner again did not return Middleton to work. (R 722) Kirchner told Middleton there was no light duty work available and that he could not return to his former job. *Id.* This was simply not true. *Id.* During Middleton's employment with BFG prior to his

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[3] The Floor Person/Apprentice Operator job occasionally involves working with molds which actually shape the bottle. (R 722) The molds come in various sizes for making 7 ounce, 12 ounce, 32 ounce and 40 ounce bottles. *Id.* The molds for making the 12 ounce and 32 ounce bottles were the most commonly used molds during 1998 and 1999. (R 754) Regardless of the size of the mold, the mold separates into three parts. (R 722) The 32 ounce mold weighs 55 pounds total, with each part weighing 24 pounds, 24 pounds and 7 pounds. (R 753) The 12 ounce mold weighs 50 pounds total, with each part weighing 22 pounds, 22 pounds and 6 pounds. (R 754) The 40 ounce mold weighed a little more than the 32 ounce mold and the 7 ounce mold weighed a little less than the 12 ounce mold. (R 759) When working with the molds, a four wheel cart is used to transport the mold to the oven. (R 722) The mold is removed by the Operator or the Upkeep by sliding. *Id.* The mold is then broken apart, cleaned, rolled to the machine and installed. *Id.* When removing the mold from the machine, it must be removed in pieces, as opposed to as a single unit. *Id.* Significantly, when touring the plant, Dr. Osborn observed the molds in one piece and was not informed by his guide that the molds could be broken down into three parts. (R 767-68) Also, when Middleton worked as an Apprentice Operator (prior to his injury), an Upkeep, who was regularly available, often performed the mold change for him. (R 722)

May 1996 injury, Middleton had worked light duty jobs. *Id.* Middleton also observed other employees performing light duty work, including repack work and painting. *Id.* Also, according to Milford Jordan, a plant employee, during 1998 and 1999 there were light duty jobs being performed. (R 755-57) Jordan recalled at least two employees who were permitted to stay in the office on light duty, and another employee who was permitted to paint. *Id.* Union Officer Darrell Grounds testified that during the first quarter of 1999, there were vacancies being filled with employees on lay off status, and that Middleton should have been eligible for recall, at least for part-time work. (R 782-85, 786) Grounds also recalled at least two employees who were working on light duty during 1999. (R 786) Kirchner admitted that light duty is provided at the discretion of the company, and that there is no policy requiring time limits on the availability of light duty. (R 744-45)

On July 26, 2000, two and a half years after his initial work release and after this litigation was filed, with no changes in his physical restrictions, Middleton was offered reinstatement by BFG. (R 600, 630, 665, 724) Middleton returned to work on August 2, 2000, and has worked in repack and as a Line Attendant (jobs he had requested as early as Spring 1998). (R 719, 724)

ARGUMENT: REASONS FOR ALLOWANCE OF THE WRIT

1. The Fifth Circuit's Opinion utilizes this Court's opinion in *Toyota Motor Mfg., Ky., Inc. v. Williams*, 534 U.S. 184, 122 S.Ct. 681, 151 L.Ed.2d 615 (2002) to hold that an employee, who is prohibited by his *employer* from performing a variety of jobs as a result of a work-related disability for which he is otherwise qualified, is not disabled reasoning that despite the employee's ability and willingness to work, *Toyota* extinguishes the employer's liability for regarding the employee as being too disabled to work with or without reasonable accommodation. If that is the law, then every employer could refuse to permit any disabled employee from returning to work by simply claiming that the employee cannot work.

The district court granted summary judgment on Middleton's ADA claims after determining that Middleton, although arguably perceived as being disabled by BFG, was not an otherwise qualified individual with a disability and was not retaliated against by BFG. (Appendix C). After hearing oral arguments on December 6, 2001, the Fifth Circuit subsequently affirmed the district court's granting of summary judgment in a January 16, 2002 Opinion. (Appendix A at App. 1-2) In affirming summary judgment the Fifth Circuit relied on this Court's Opinion in *Toyota Motor Mfg., Ky., Inc. v. Williams*, 534 U.S. 184, 122 S.Ct. 681, 151 L.Ed.2d 615 (2002). (App. 2) In a three-paragraph, six sentence Opinion citing *Toyota*, the Fifth Circuit held that the inability to perform a particular job does not constitute a substantial limitation on the major life activity of working, despite Middleton's ability

to perform several jobs with and without accommodation. The Fifth Circuit also concluded that Middleton was not perceived as disabled even though the district court concluded Middleton was perceived as disabled by BFG. (App. 2, App. 27-29)

Notably, in its haste to dismiss the case under *Toyota*, the Fifth Circuit did not address the district court's finding (and ignored Middleton's supporting summary judgment evidence) that summary judgment was not warranted because of BFG's perception of Middleton as being disabled as defined by 42 U.S.C. § 12102(2)(C). (App. 1-2, 27-29) Instead, the Fifth Circuit extended *Toyota* from a case resolving the proper standard for assessing whether an individual is substantially limited in performing manual tasks for purposes of defining disability under 42 U.S.C. § 12102(2)(A)[4] to a case that somehow also disposes of claims involving an employee who is clearly regarded by the employer as being disabled under 42 U.S.C. § 12102(2)(C), even though the employee and his physician maintained the employee was "otherwise qualified". The Fifth Circuit's opinion further nullifies the interactive process of determining reasonable workplace accommodation. There is simply no basis for the Fifth Circuit's application of *Toyota* to cases involving a "regarded as" disability and this Court should grant review to prevent the requirement of the interactive workplace accommodation process from becoming a mockery.

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[4] *See Toyota*, 122 S.Ct. at 689, 690.

In addition to erroneously extending *Toyota* to "regarded as" disability cases, the Fifth Circuit's declaration that, based on *Toyota*, an inability to perform a particular job does not substantially limit the major life activity of working is nonsensical and constitutes a significant error in the law. First, *Toyota* involved the assessment of an inability on the major life activity of performing manual tasks, not working. *Toyota*, 122 S.Ct. 689, 690. Moreover, the Court in *Toyota* specifically stated that it was not ruling on the inherently difficult question of whether "working" constituted a major life activity. *Toyota*, 122 S.Ct. at 692.

Additionally, the Fifth Circuit ignored Middleton's evidence that he would have been able to perform his former job and many other available jobs had he been provided reasonable accommodations by BFG. Middleton attempted to return to work for over two years, but was prevented from doing so by BFG's ever-changing and never-ending prerequisites which prevented Middleton's return to work. It was this very evidence of BFG's repeated refusal to return Middleton to work, despite his multiple releases from his doctor, that the district court found could support a finding that Middleton was "regarded as" being disabled by BFG. This evidence should have precluded summary judgment rather than prompting it somehow under *Toyota*.

Correction by this Court of this clear misinterpretation by the Fifth Circuit is proper and necessary to avoid future summary dismissals of ADA cases involving "regarded as" employees who attempt to return to work after a disabling on-the-job injury.

2. **The Opinions of the District Court and the Fifth Circuit once again lay credence to the practice of granting summary judgment in an employment discrimination claim by ignoring competent summary judgment evidence submitted by a non-movant employee (particularly testimony of the employee) and accepting evidence of the movant-employer as true. The opinions ignore this Court's holding in *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 120 S.Ct. 2097, 147 L.Ed.2d 105 (2000) regarding the quantum of proof required in an employment discrimination case. Such deviation from the accepted and usual course of proceedings under Fed. R. Civ. P. 56 and the rules of law mandated by this Court leaves uncertain the role of the trial court, the viability of *Reeves*, the burden of the nonmovant in a summary judgment proceeding in an employment discrimination case and an employee's ability to properly evaluate the unlawful conduct of the employer; therefore, review by this Court is warranted.**

3. **The Opinions of the district court and the Fifth Circuit transform the interactive process under the ADA as a means to effectuate rather than prevent discrimination which warrants review by this Court.**

In addition to improperly applying *Toyota*, the Fifth Circuit further stated that summary judgment was "essentially" affirmed for the reasons stated by the district court. (App. 2) This approval of the district court's opinion once again exemplifies the Fifth Circuits proclivity for deviating from the basic summary judgment burdens of proof as set forth in Fed. R. Civ. P. 56 and by

this Court in cases such as *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 120 S.Ct. 2097, 147 L.Ed.2d 105 (2000). Applying the proper summary judgment standards, summary judgment was improper in this case.

Middleton plainly established material fact issues regarding his ability to establish a *prima facie* case of disability discrimination. To establish a *prima facie* case of discrimination under the ADA, the employee must show that "[h]e is a qualified individual with a disability and that the negative employment action occurred because of the disability." *See Giles v. General Electric Co.*, 245 F.3d 474, 483 (5th Cir. 2001), *quoting Sherrod v. American Airlines, Inc.*, 132 F.3d 1112, 1119 (5th Cir. 1998). The ADA defines disability as follows: (A) a physical or mental impairment[5] that substantially limits one or more of the major life activities of such individual; (B) a record of such an impairment; or (C) being regarded as having an impairment.[6] 42 U.S.C. § 12102(2).

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[5] A "physical impairment" includes any physiological disorder, or condition, cosmetic disfigurement or anatomical loss affecting one or more of the following body systems: neurological, musculoskeletal. . . . *Sutton v. United Air Lines, Inc.*, 119 S.Ct. 2139, 2145 (1999). It was undisputed that Middleton has a physical impairment to his back. (R 387, 788-97)

[6] An individual may be regarded as having a disability if: (1) the employer mistakenly believes that an employee has a physical impairment that substantially limits one or more major life activities; or (2) an employer mistakenly believes that an actual nonlimiting impairment substantially limits one or more major life activities. *Sutton*, at 2149-50.

BFG moved for summary judgment claiming that Middleton was not "disabled." (R 387-90) Although finding that Middleton did not have an impairment which substantially limited major life activities or a record of an impairment,[7] the district court properly held that fact

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[7] This was error, but did not warrant summary judgment because the district court found fact issues as to whether Middleton was "disabled" under the "regarded as" element of the definition. (R 911-12) There were, however, fact issues regarding whether Middleton was substantially limited in major life activities which would also have precluded summary judgment. The ADA regulations define a "major life activity" to include "functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working." 29 C.F.R. § 1630.2(i) (1996); *Sutton*, at 2145. An individual is "substantially limited" if he is unable to perform a major life activity that the average person is able to perform, or is significantly restricted as to the condition, manner or duration under which an individual can perform a particular major life activity as compared to the average person in the general population. 29 C.F.R. § 1630.2(j)(i)(ii) (1996); *Sutton* at 2145. There were fact issues that Middleton was disabled because he has a physical impairment (post laminectomy syndrome from an on-the-job injury which required back surgery) that substantially limits major life activities, i.e., lifting, bending, pushing, pulling, walking, driving and jogging. (R 600, 793-94, 797) Middleton also has a 20% impairment rating. (R 718) Also, Middleton's medical records indicate he has an impairment that substantially limits major life activities; therefore, he is "disabled" because he has a "record of a disability". (R 600, 793-94, 797) The district court reiterated precedent from the Fourth Fifth and Eight Circuits that a 25-pound "lifting" restriction, as a matter of law, is not a substantial limitation on a major life activity. (App. 23-24) Such a holding is clearly belied by logic and determinations of what is substantially limiting to major life activities should be evaluated on a case by case basis.

issues existed as to whether BFG "regarded" Middleton as being disabled. (R 907-12) This finding however was disregarded by the Fifth Circuit utilizing *Toyota*. (App. 20-22). BFG argued that it did not "regard" Middleton as disabled because it only viewed him as unable to perform his prior job, but was willing to put him in other positions. (R 390) If this had been true, however, Middleton should have been permitted to return to work long before August 2, 2000. Instead, BFG advanced one excuse after another denying and delaying Middleton's return to work and repeatedly claimed to need more information to protect BFG from liability. (R 742)

As the district court correctly held, a jury could reject BFG's claimed need for more medical testing as pretextual because Middleton's doctor had previously provided evidence of his ability to work. (R 911-12) In fact, Dr. Osborn had performed an FCE, toured the plant, provided work releases and specified at least five jobs in addition to his former job that Middleton could perform. (R 600, 602-03, 619, 621-22, 630, 719-22, 764-65) BFG's two-plus year delay in returning Middleton to work despite repeated work releases and information from his doctor provided evidence upon which a fact finder could conclude that BFG "regarded" Middleton as disabled; therefore, summary judgment was properly denied on this point. Contrary to the Fifth Circuit's opinion, there is nothing in *Toyota* which would support a finding otherwise.

The Fifth Circuit stopped short of evaluating the issue of whether summary judgment was improper based on the district court's determination that Middleton was not a "qualified individual with a disability." (App. 1-2)

Again, improperly using *Toyota* as a blanket to extinguish all claims, the Fifth Circuit then claimed that the summary judgment was otherwise affirmed for "essentially" the same reasons set forth in the district court's opinion. The Fifth Circuit's Opinion leaves open to interpretation just what portions of the district court's opinion were "essentially" approved, the "otherwise qualified" issue included.

To avoid summary judgment on the "otherwise qualified" issue, Middleton need only have shown (1) that he could perform the essential functions of the job, or (2) that a reasonable accommodation of his disability would have enabled him to perform the essential functions of the job. *Turco v. Hoechst Celanese Co.*, 101 F.3d 1090, 1093 (5th Cir. 1997). A "qualified individual with a disability" is an individual who, with or without reasonable accommodation, can perform the essential functions of the employment position that such an individual holds or desires. 42 U.S.C. § 12111(8).

The district court held, with the "essential" approval of the Fifth Circuit, that Middleton was not "otherwise qualified" because he was unable to perform essential functions (mold changes) of his job without assistance, and that assistance as an accommodation was unreasonable as a matter of law. (R 913) To the contrary, there were fact issues regarding whether Middleton would even need extra assistance changing the molds because the molds could be separated into three manageable pieces (most weighing less than 25 pounds, within Middleton's

restrictions) for changing.[8] (R 722) Also, contrary to the district court's finding that use of an Upkeep to assist in mold changes, was unreasonable because it would create additional work, Middleton testified that even before his injury, an Upkeep regularly assisted him with mold changes. (R 722, 914) Thus, the evidence demonstrated that Middleton would not need assistance with most mold changes (with the possible exception of the rarely used larger 40 oz. mold), and for those that he did need some assistance with, use of an Upkeep would not cause any additional work. (R 722) There was clearly evidence that Middleton could have performed his former position even with his restrictions and without imposing additional work on others.

Also, there were at least five other "cold end" jobs identified by Dr. Osborn which Middleton could have performed, but which were not offered by BFG. (R 619, 721) Light duty was available and offered to other employees during 1998 and 1999. (R 744-45) In dismissing this evidence, the district court held that BFG was not obligated to place Middleton in another job, even though with the state of the record, a refusal to do so was evidence of different treatment. (R 915) This ignores the ADA requirement that employers make reasonable accommodations, which may include reassignment to a vacant position including light duty. *See Loulseged v. Azko Noble, Inc.*, 178 F.3d 731, 734 (5th Cir. 1999); 42 U.S.C.

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[8] When Middleton's doctor initially placed the "no mold changing" restriction on him, he did not realize, and had not been told during the plant tour, that the molds did not have to be changed in one piece. (R 767-68)

§§ 12111(9), 12112(a), 12112(b)(5). The district court and the Fifth Circuit declined to recognize the violation despite clear evidence of other jobs Middleton could perform which were open. (If they were not, there was no reason for Kirchner to nit-pick Dr. Osborn.) For an accommodation of reassignment to be reasonable, the position must exist and be available, and the employee must request and be qualified for the position. *Foreman v. Babcock & Wilcox Co.*, 117 F.3d 800, 810 (5th Cir. 1997); *Burch v. City of Nacogdoches*, 174 F.3d 615, 622 (5th Cir. 1999).

Middleton repeatedly requested to be returned to work in a variety of available positions for which he was qualified (including light duty which was offered to other employees). (R 719-24, 755-57, 782-86) Although seniority may have prevented Middleton from returning to a "cold end" job for a period of time, this would not have prevented him from working in the interim in light duty jobs (which were available at BFG's discretion with no policy limit on time) or in other jobs being filled by recalled employees in early 1999. (R 744-45, 782-86) The district court improperly rejected Middleton's evidence of other available jobs as being only bald assertions by Middleton, insufficient and in conflict with BFG's claims that light duty was only temporary and for those who were expected to return to work without permanent restrictions. (R 915-16) That Middleton's evidence conflicted with BFG's assertions should have precluded summary judgment. *Reeves v. Sanderson Plumbing Products, Inc.*, 120 S.Ct. 2097, 2109 (2000); *Russell v. McKinney Hospital Venture*, 235 F.3d 219, 223 (5th Cir. 2000). Instead, the district court, with the "essential" approval of the Fifth Circuit, improperly determined that based on BFG's "rationale"

that light duty was temporary (despite Kirchner's admission to the contrary), there was no reason to return Middleton to work. (R 916) To the contrary, based on Middleton's controverting evidence of his ability to work, the removal of his restrictions as permanent, his repeated efforts to return to work, Kirchner's inquiry regarding his ability to perform other jobs and the availability of other work, a factfinder could have rejected BFG's claimed "rationale" as pretext for ADA discrimination or retaliation. *St. Mary's Honor Center v. Hicks*, 113 S.Ct. 2742, 2752-53 (1993); *Reeves* at 2108-09; *Russell* at 223 (proof that the employer's stated reason for the adverse employment action taken is false is a form of circumstantial evidence that is probative of intentional discrimination.)

The district court, and the Fifth Circuit, erred in rejecting Middleton's evidence which controverted BFG's claimed reason for failing to return him to his former job or other jobs. (App. 2; R 915-16) Such evidence included Middleton's testimony, testimony of a union officer, testimony of a plant worker, testimony of Dr. Osborn and Kirchner's testimony regarding the availability of light duty *at BFG's discretion with no time restrictions.* (R 722, 744-45, 755-57, 782-86) This evidence controverts BFG's claims that Middleton was unable to perform his former job and that other jobs were not available and is sufficient to defeat summary judgment. *See Evans v. City of Bishop*, 238 F.3d 586, 590 (5th Cir. 2000) (summary judgment not proper where employee challenges the employer's claims and puts forth evidence aside from subjective belief, even if it consists solely of employee's testimony); *Vance v. Union Planters Corp.*, 209 F.3d 438, 442 & n.3 (5th Cir.

2000) (even if evidence consists solely of plaintiff's testimony, discrimination may be established).

With the evidence from Middleton and others of Middleton's ability to work, available jobs for which Middleton was qualified prior to August 2000 and BFG's refusal to return him to work, a jury could have reasonably found that Middleton was an otherwise qualified individual with a disability, that BFG failed to reasonably accommodate him and failed to do so for pretextual reasons in violation of the ADA;[9] therefore, it was error to grant and affirm summary judgment on Middleton's ADA claim. *Reeves; Russell; Evans; and Blow v. City of San Antonio*, 236 F.3d 293, 298 (5th Cir. 2001) (summary judgment precluded where employee establishes *prima facie* case, creates issue of disputed fact as to whether employers stated reason is false and there are no unusual circumstances which would prevent a factfinder from concluding that the stated reasons were discriminatory).

BFG also claimed that Middleton could not establish a *prima facie* case of ADA retaliation. A *prima facie* case of retaliation is established when there is a causal connection between an adverse employment action and an employee's participation in a protected activity. *Seaman v. CSPH, Inc.*, 179 F.3d 297 (5th Cir. 1999). For over two

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[9] Aside from disputing the evidence of a *prima facie* case of ADA discrimination, BFG did not move for summary judgment on the issue of pretext and the court did not grant summary judgment on that issue. (R 387-93, 912) Even had BFG moved on that ground, the evidence as discussed above and below, sets forth material fact disputes on the falsity of the stated reason for failing to return Middleton to work and pretext which would preclude summary judgment on the ADA discrimination claim.

years Middleton repeatedly requested reasonable accommodations which would enable him to return to work. (R 719-24) Each request for accommodation was followed by either a flat denial or a request from BFG for more information. *Id.* Despite work releases and repeated provision of information, BFG refused to permit Middleton to return to work. *Id.* As such, summary judgment was not proper on this claim.

The district court held, with "essential" approval of the Fifth Circuit, that even assuming Middleton established a *prima facie* case of ADA retaliation, the evidence failed to demonstrate fact issues regarding retaliation under the ADA. (App. 2; R 917-19) Middleton, however, was clearly discriminated and retaliated against in violation of the ADA when, as previously set forth, he was repeatedly denied reasonable accommodations for his disability and even a return to work without accommodations. (R 719-24) BFG nullified the interactive process and refused to make reasonable accommodations for Middleton for over two years. *Id.* When Middleton initially presented for work, he was sent home. (R 719) When he presented an additional work release in early May 1998, he was again sent home. (R 720) Kirchner exhibited open hostility toward the work releases and claimed to be "concerned" about a "miraculous" change from permanent to temporary restrictions. (R 735) Rather than addressing her alleged "concerns" with Middleton's doctor, Kirchner instead opted simply not to permit Middleton to return to work.[10] (R 803-06) Middleton

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[10] Contrary to the district court's finding, and the Fifth Circuit's "essential" approval, there was nothing contradictory

presented work releases again in June and July 1998 to no avail. (R 720) In August 1998, after 4 work releases, Kirchner invited Dr. Osborn to identify jobs which Middleton could perform. (R 604) Although it was undisputed that Dr. Osborn complied with her request and identified 5 to 6 potential jobs, Kirchner still refused to permit Middleton to return to work. (R 721, 729) Instead, as a further delay, she then sought details on how Middleton could perform every single task, along with an FCE (not to mention, if the jobs were not available, then Kirchner was wasting everyone's time and effort). *Id.* After the FCE, Kirchner still claimed to need further explanation about Middleton's abilities. (R 629, 721) Dr. Osborn toured the plant after Kirchner had represented that this would enable Middleton to return to work. (R 722, 738-41, 766-68, 773-76) Dr. Osborn reconfirmed his previous opinion of which jobs could be performed, but still claiming not to be satisfied, Kirchner did not permit Middleton to work. (R 722) Instead, BFG had its own work site assessment performed and continued to delay (for well over another year) Middleton's clearance for work, raising issues of an alleged need for a medical authorization and another FCE (all of which had been

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about Dr. Osborn's records, i.e., the diagnosis of post-laminectomy syndrome remaining the same or the fact that Middleton will have some permanent disability, but that some restrictions may change. (R 506-07, 514, 600, 602-03, 918) The absurdity of the district court's opinion is obvious. To accept it, means that no one's health ever improves in the eyes of the federal judiciary. If there was an issue on Dr. Osborn's credibility or the legitimacy of BFG's rejection of Dr. Osborn's opinion, it should have been left for the factfinder to weigh. *Russell* at 233.

previously provided). (R 631-32, 635-36, 640, 642, 652, 656-60, 723-24)

Middleton was finally returned to work in a "cold end" job on August 2, 2000, and has since worked in the very jobs he had requested over two years earlier. (R 724) After suit was filed, BFG belatedly abandoned the long-standing and ongoing microscopic analysis of all elements, not just the essential elements of the jobs in question. Although BFG attempted to place the blame for Middleton's delay in returning to work on Middleton, this delay was plainly caused by BFG's refusal to honor Middleton's multiple work releases dating as far back as March 1998. Regardless of the obstacles breached by Middleton, one pretextual excuse after another was concocted to preclude his return to work.

In affirming summary judgment in this case, the Fifth Circuit also obfuscates the issue of the sufficiency of the proof necessary to defeat summary judgment in an employment discrimination case. Middleton's evidence was ignored and BFG's contradictory evidence was embraced. Review by this Court is proper to reiterate the quantum of proof necessary in a summary judgment process in an employment discrimination case.

Additionally, because BFG's conduct nullified the ADA's interactive process, a reasonable factfinder could easily infer that Middleton was discriminated and retaliated against in violation of the ADA. *See Loulseged v. Akzo Noble, Inc.*, 178 F.3d 731, 735-36 (5th Cir. 1999), *citing Taylor v. Principal Financial Group*, 93 F.3d 155 (5th Cir.), *cert. denied*, 117 S.Ct. 586 (1996). When an employer's unwillingness to engage in the interactive process leads

to a failure to reasonably accommodate, the employer violates the ADA. *Loulseged* at 736, *citing Taylor* at 165. The duty to launch the interactive process is triggered by the request for a reasonable accommodation and the responsibility for the interactive process is shared between the employee and the employer. *Loulseged* at 736, *citing Taylor* at 165. An employer does not meet its duty of participating in the interactive process to determine whether reasonable accommodations could be made when the dialogue consists of the employer telling the employee there are no positions they could perform. *Loulseged* at 738 (a declaration by an employer that no reasonable accommodations will be made is a breakdown in the interactive process). Likewise, a party that delays the interactive process is responsible for the breakdown. *Loulseged* at 737, fn. 6. BFG's conduct here hardly qualifies as a good faith participation in this process, nevertheless the district court somehow found that BFG demonstrated a willingness to resolve the questions of Middleton's fitness for work by frequently initiating correspondence between the parties. (App. 38) BFG's alleged "initiating", however, could equally have been viewed by the fact-finder as repeated attempts to erect pretextual obstacles to preclude Middleton's return to work.

By affirming summary judgment in this case, the Fifth Circuit also condoned BFG's failure to engage in good faith in the interactive process and essentially leaves open the ability of employers to freely violate the ADA by preventing disabled employees from returning to work by simply indefinitely imposing one requirement after another on the employee. The district court and

Fifth Circuit have effectively turned the interactive process into a tool to promote discrimination by the employer who chooses to never end the process. Reversal of the transformation of the interactive process from an aid against discrimination to a means to openly discriminate warrants review by this Court.

CONCLUSION

The *Middleton* opinion exemplifies the need for guidance for courts to follow in determining the proper applicability of *Toyota* to disability cases wherein the employee is "regarded as" being disabled by the employer. Far from a fact specific ruling, the *Middleton* opinion clearly necessitates review by this Court to prevent further erroneous dismissals in cases where the employee is regarded as being disabled by the employer, desires to return to work, but the employer constructs one obstacle after another to prevent the return to work. Review is appropriate in this case to address the denigration of the interactive process involved in workplace accommodation and the Fifth Circuit's justification of that deneigration under the guise of this Court's opinion in *Toyota*.

WHEREFORE, Petitioner, Steve Middleton, respectfully prays that the Court grant Petitioner's Writ of Certiorari, reverse the judgments of the Fifth Circuit and the district court with instructions to remand the case for trial on the merits.

Respectfully submitted,

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IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No 01-10329

STEVE MIDDLETON,

Plaintiff-Appellant,

VERSUS

BALL-FOSTER GLASS CONTAINER COMPANY, L.L.C.,

Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of Texas
No 3:99-CV-964-P

(Filed Jan. 16, 2002)

Before JOLLY, SMITH, and BENAVIDES, Circuit Judges.

PER CURIAM:*

Steve Middleton appeals a summary judgment on his claims of discrimination and retaliation under the Americans with Disabilities Act and retaliation under the Texas Labor Code. We have reviewed the briefs and pertinent portions of the record and have heard the arguments of counsel.

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* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

We conclude that the district court was correct in ascertaining that Middleton was neither disabled nor perceived as such and that there was no retaliation. The inability to perform a particular job does not constitute a substantial limitation on the major activity of working. *See generally Toyota Motor Mfg., Ky., Inc. v. Williams*, No. 00-1089, 2002 U.S. LEXIS 400 (U.S. Jan. 8, 2002).

The summary judgment is AFFIRMED, essentially for the reasons given by the district court in its comprehensive memorandum opinion and order entered on February 2, 2001.

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

STEVE MIDDLETON, Plaintiff,	§	
v.	§	NO. 3:99-CV-0964-P
BALL-FOSTER GLASS CONTAINER CO., L.L.C., Defendant.	§	

FINAL JUDGMENT

(Filed Feb. 5, 2001)

Pursuant to the Court's Memorandum Opinion and Order filed February 2, 2001, the Court issues judgment as follows:

It is ORDERED ADJUDGED and DECREED that,

1. Plaintiff Steve Middleton shall take nothing from his claims against defendant The Ball-Foster Glass Container Co., L.L.C.

2. Accordingly, costs incurred by the defendant, shall be assessed against plaintiff.

IT IS SO ORDERED.

Signed this 2nd day of February, 2001 at Dallas, Texas.

/s/ Jorge A. Solis
JORGE A. SOLIS
UNITED STATES DISTRICT JUDGE
NORTHERN DISTRICT OF TEXAS

FINAL JUDGMENT

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

STEVE MIDDLETON,	§	CIVIL ACTION NO.
	§	3:99-CV-0964-P
Plaintiff,	§	
	§	
v.	§	
	§	
BALL-FOSTER GLASS	§	
CONTAINER CO., L.L.C.,	§	
	§	
Defendant.	§	

MEMORANDUM OPINION AND ORDER

(Filed Feb. 2, 2001)

Now before the Court are Defendant's Rule 56 Motion for Summary Judgment and Rule 12(b)(1) Motion to Dismiss, Plaintiff's Response to Defendant's Motion to Dismiss and for Summary Judgment, and Defendant's Reply to Plaintiff's Response to Defendant's Rule 56 Motion for Summary Judgment and Rule 12(b)(1) Motion to Dismiss. The Court has considered Defendant's present motion and, for the reasons discussed herein, hereby DENIES Defendant's Motion to Dismiss and GRANTS Defendant's Motion for Summary Judgment.

BACKGROUND

Plaintiffs' Complaint alleges that Defendant violated the Americans with Disabilities Act, 42 U.S.C. § 12101, *et seq.* ("ADA"), by failing to reasonably accommodate him, unlawfully "refus[ing] to permit Plaintiff to return to work on or after March 27, 1998 although released by his

doctor, and retaliation". Plaintiff also alleges a violation of Texas Labor Code § 451.001 for discrimination against Plaintiff because he filed a worker's compensation claim in good faith.

Plaintiff is represented by the Glass, Molders, Pottery Plastics & Allied Workers Union, AFL-CIO, CLC ("the Union"). On October 16, 1998, the Union filed a grievance on Middleton's behalf, alleging contractual violations.[1] Pursuant to the grievance under the National Labor Relations Act, 29 U.S.C. §§ 151, *et seq.* ("NLRA"), an arbitration was held before a mutually selected neutral. On July 11, 2000 the arbitrator issued his Award denying the grievance.[2]

FACTS

Ball-Foster's Waxahachie plant manufactures glass bottles. Prior to his injury, Plaintiff was employed as a floor person/apprentice operator in the part of the plant where molten glass is formed by machines into bottles, known as the "hot end;" the "cold end" is the part of the plant where the bottles are inspected, put into boxes, stored in a warehouse, etc.[3] Prior to becoming a floor person/apprentice operator, Plaintiff worked at various jobs in the cold end.[4]

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[1] Def's App. at 11.

[2] Def's App. at 59.

[3] Def's App. at 16-18, 20-23.

[4] Def's App. at 16-18, 20-23.

On May 30, 1996, Plaintiff suffered a back injury on the job, and later took an extended medical leave of absence for surgery and recovery/rehabilitation.[5] In August of 1996, Middleton was seen by two company doctors: Dr. Bousquet, and Dr. Garrison of Baylorworx (a medical clinic where Defendant sends employees to treat on the job injuries), for an evaluation of his back injury.[6] Dr. Garrison evidently declined to give Plaintiff an MRI, thinking it an unnecessary expense, and released Plaintiff to work with no restrictions on September 3, 1996.[7] Plaintiff provided his release to Defendant and resumed working. On September 7, Plaintiff went to the emergency room to treat his back pain; he was then referred to Dr. Bousquet for an MRI.[8] Dr. Bousquet removed Plaintiff from work, an MRI was performed, and Middleton underwent back surgery to treat a herniated disk.[9] In September 1996, Plaintiff filed an Employee's Notice of Injury and Claim for Compensation with the Texas Worker's Compensation Commission (TWCC) and began receiving benefits.[10] In October 1997, Middleton had a Functional Capacity Evaluation (FCE) performed at Baylorworx at Dr. Bousquet's recommendation.[11]

Plaintiff was released to work with no restrictions by Dr. Bousquet, and returned to work on January 5, 1998 in

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[5] Def's App. at 60-64.

[6] Pl's App. at 2, 28.

[7] Pl's App. at 2.

[8] Pl's App. at 2.

[9] Pl's App. at 2-3.

[10] Pl's App. at 3.

[11] Pl's App. at 3.

his floor person/apprentice operator position, an absence of 15 months.[12] The next day, Plaintiff's supervisor evidently singled out Middleton for a verbal warning for his performance, and placed him on a machine he was unfamiliar with; a writeup for poor performance followed.[13]

Plaintiff experienced pain and back swelling, and on March 2, 1998, Plaintiff changed his "treating doctor" upon approval from the TWCC to Charles Osborn, a local chiropractor.[14] Dr. Osborn's initial medical opinion was that Plaintiff had permanent work restrictions, meaning they lasted "forever."[15] Plaintiff Middleton understood that Doctor Osborn's restrictions were permanent, but that he might be able to do a cold end job.[16] Julia Kirchner, Defendant's Human Resources Manager, evidently also understood the restrictions to be permanent.[17] Dr. Osborn wrote an Employee's Work Limitation Slip for Middleton to give to Defendant, and recommended a "badge change," or permanent job reassignment.[18] Around March 27, 1998, Plaintiff was released to work permanent light duty.[19] Plaintiff was diagnosed with post-laminectomy syndrome and was restricted by his doctor from lifting over 25 pounds, excessive bending,

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[12] Pl's App. at 3; Def's App. at 85.

[13] Pl's App. at 3-4.

[14] Def's App. at 99; Pl's App. at 4.

[15] Def's App. at 100, 152.

[16] Def's App. at 86, 87, 30-31, 94-95.

[17] Def's App. at 182-84.

[18] Def's App. at 114, 134, 153-157.

[19] Def's App. at 172 (Pl's Answers to Interrogatories).

and heavy pushing and pulling.[20] Plaintiff then attempted to return to work and presented his release to Human Resources Manager Julie Kirchner, who told Plaintiff to go home and that she would call him when they had a job for him.[21]

On April 15, 1998, Middleton filled out a "Statement of Claim For Continuance of Life Insurance Protection During Total Disability" through which Dr. Osborn indicated Plaintiff was totally disabled for his regular occupation, so that he could never return to work in his regular occupation.[22] However, a second employee work limitation slip of May 8, 1998 signed by Dr. Osborn indicated that Plaintiff's limitations were temporary for 8 weeks, with no badge change recommendation.[23] Kirchner found this change out of the ordinary.[24] At some point which is disputed, Plaintiff told Dr. Osborn that his application for permanent disability benefits had been denied (for lack of seniority, as Plaintiff recalls Kirchner's account).[25] Upon seeing the change from permanent to temporary restriction, Kirchner remarked, "Oh, what an interesting coincidence," referring to her earlier explanation to Plaintiff that only those employees temporarily restricted receive light duty.[26] Two more limitation slips followed with

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[20] Def's App. at 114.

[21] Pl's App. at 4.

[22] Def's App. at 175-76. *See also* Def's App. at 135-36, 160-62 (testimony of Osborn).

[23] Def's App. at 196.

[24] Def's App. at 186.

[25] Def's App. at 32-33; Pl's App. at 5.

[26] Pl's App. at 21.

similar temporary restrictions and limitations on Plaintiff's physical activities.[27]

On August 10, 1998, Kirchner wrote to Dr. Osborn *expressing her* understanding that Plaintiff could not return to his old job, and requesting Osborn to consider Plaintiff's fitness for several "cold-end" jobs.[28] Dr. Osborn's reply simply listed several cold-end jobs which he thought Plaintiff could do.[29] Kirchner wrote back to ask for more information, noted Defendant's desire for a second opinion from its own doctor, and requested Osborn to prescribe an FCE from Baylorworx.[30]

Around September 14, 1998, Middleton told Kirchner that he did not want Baylorworx to perform the FCE, but would prefer Sargent Injury Rehabilitation, and Kirchner agreed.[31] Plaintiff opposed using Baylorworx because of Dr. Garrison's less than thorough and accurate examination and diagnosis of Plaintiff's original injury; Plaintiff further understood that where an FCE is performed is inconsequential, but that Sargent's equipment was computerized, not manual like Baylorworx's.[32] Dr. Osborn was an employee of Sargent, though Kirchner was not aware of it when she approved of Sargent.[33] When Kirchner received the Sargent FCE signed by Osborn and

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[27] Def's App. at 198-99.

[28] Def's App. at 200.

[29] Def's App. at 215.

[30] Def's App. at 216.

[31] Def's App. at 188-89.

[32] Pl's App. at 6.

[33] Def's App. at 125-26, 138, 188-89.

citing his opinions, she realized the FCE was not independent from the first opinion she sought to verify.[34] The FCE specifically approved Middleton's return to the cold end jobs previously listed by Dr. Osborn.[35] However, the *FCE stated Middleton was restricted on a repetitive* basis from most of the physical activities listed, including bending and reaching.[36] The meaning or application of these restrictions is not elaborated.[37] Kirchner wrote to Osborn to reconcile the apparent discrepancies, and Dr. Osborn took a tour of the plant before writing Kirchner that Plaintiff could return to the floor person/apprentice operator position, a hot end job, "provided he does not have to change out the cores or the molds himself," and also naming several suitable cold end jobs.[38] There is evidence that Kirchner had stated that if Osborn would tour the plant and note the jobs Middleton could perform, Middleton would be returned to work.[39]

Kirchner brought in Cathleen Moore of Baylorworx who conducted a job site assessment at the plant in February of 1999 and concluded that changing of the molds was an essential floor person/apprentice operator job function; Plaintiff has agreed.[40] In March 1999, Kirchner wrote Middleton to request a release of medical

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[34] Def's App. at 189-91, 218.

[35] Def's App. at 218.

[36] Def's App. at 220.

[37] *Id.*

[38] Def's App. at 191-92, 225-26.

[39] Pl's App. at 58-61.

[40] Def's App. at 227, 232, 92-93, 19.

information so a third party could compare the job analysis to Plaintiff's medical capabilities.[41] Plaintiff's attorney responded a month later by criticizing Defendant's delay in returning Plaintiff to work and the rejection of Dr. Osborn's recommendations, and threatened suit.[42] Defendant's response just twelve days later cited apparent inconsistencies in Dr. Osborn's statements and expressed the desire for a second opinion.[43]

In July 1999, Defendant wrote Middleton to inform him of a recall from layoff and invite him to take a cold end job if he would submit to an FCE by Company doctors who would determine if Middleton could work safely.[44] Plaintiff's response only criticized Defendant's conduct in contacting Mr. Middleton rather than his counsel; Defendant responded to the concern.[45]

On September 21, 1999, Middleton was informed by Todd Glawe, Defendant's new human resources manager, that he was being suspended for refusing to report to Baylorworx for evaluation.[46] Plaintiff responded by offering to submit to evaluation by a provider other than Baylorworx and noting Defendant's rights to a medical exam under the Federal Rules.[47] Defendant later sought simply to confirm Plaintiff's first FCE as well as to obtain

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[41] Def's App. at 234.

[42] Def's App. at 236.

[43] Def's App. at 238.

[44] Def's App. at 248.

[45] Def's App. at 249, 250.

[46] Def's App. at 251; Pl's App. at 8.

[47] Def's App. at 252-53. Pl's App, at 8.

the medical release.[48] Plaintiff claims that Middleton provided a medical records authorization in response to Defendant's Request for Production in this case.[49] Plaintiff's letter to Defendant claimed to have provided a release in August 1999, and further stated that Kirchner had access to Middleton's release through Metropolitan Life Insurance Company since 1998, that Middleton had authorized release of his information at Baylorworx in 1996, and that Baylorworx as a designated expert could review Middleton's file.[50]

The Sargent FCE was eventually given to Baylorworx. Plaintiff received an offer to return to a cold end job and has worked there since August 2, 2000 primarily as a line attendant.[51]

DISCUSSION

A. SUMMARY JUDGMENT STANDARD

Summary Judgment shall be rendered when the pleadings, depositions, answers to interrogatories and admissions on file, together with affidavits, if any, show that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). All evidence and the reasonable inferences to be drawn therefrom must be viewed in the light most

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[48] Def's App. at 254.

[49] Pl's App. at 9. The Court notes the lack of citation to documentary evidence of Plaintiff providing such a release.

[50] Def's App. at 255-56.

[51] Pl's App. at 9.

favorable to the party opposing the motion. *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962). The moving party bears the burden of informing the district court of the basis for its belief that there is an absence of a genuine issue for trial, and of identifying those portions of the record that demonstrate such an absence. *Celotex*, 477 U.S. at 323.

Once the moving party has made an initial showing, the party opposing the motion must come forward with competent summary judgment evidence of the existence of a genuine fact issue. *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). The party defending against the motion for summary judgment cannot defeat the motion unless he provides specific facts that show the case presents a genuine issue of material fact, such that a reasonable jury might return a verdict in his favor. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). Mere assertions of a factual dispute unsupported by probative evidence will not prevent summary judgment. *Id.* at 248-50; *Abbott v. Equity Group, Inc.*, 2 F.3d 613, 619 (5th Cir. 1993). In other words, conclusory statements, speculation and unsubstantiated assertions will not suffice to defeat a motion for summary judgment. *Douglass v. United Servs. Auto. Ass'n*, 79 F.3d 1415, 1429 (5th Cir. 1996) (en banc). If the nonmoving party fails to make a showing sufficient to establish the existence of an element essential to its case, and on which he bears the burden of proof at trial, summary judgment must be granted. *Celotex*, 477 U.S. at 322-23.

Finally, the Court has no duty to search the record for triable issues. *Guarino v. Brookfield Township Trustees*, 980 F.2d 399, 403 (6th Cir. 1992). The Court need only rely on

the portions of submitted documents to which the non-moving party directs. *Id.*

B. THE ARBITRATION CLAUSE

The Court must first consider Defendant's motion to dismiss under Fed.R.Civ.Proc. 12(b)(1). Defendant argues that Plaintiff's statutory ADA claim was waived by the arbitration provision of his collective bargaining agreement.

Defendant acknowledges the holding of the Supreme Court in *Alexander v. Gardner-Denver Co.* that an employee did not waive or otherwise forfeit his rights under Title VII when he arbitrated a contractual claim under his collective bargaining agreement that dealt with the same evidence as his Title VII statutory claim. 415 U.S. 36, 49-52 (1974). The Court found that an employee could not prospectively waive his rights under Title VII. *Id.* Defendant then cites *Gilmer v. Interstate,* which approved of arbitration generally, and held that a claim under the Age Discrimination in Employment Act was subject to compulsory arbitration pursuant to an agreement in a securities registration application (in conjunction with his employment). 500 U.S. 20, 35 (1991). The Court distinguished the issue in *Gardner-Denver* as whether an agreement precludes statutory claims merely by agreeing to arbitrate contractual ones; on the contrary, *Gilmer* dealt with an agreement to arbitrate statutory claims. 500 U.S. at 35.

The Supreme Court recognized the tension between the two doctrines in *Wright v. Universal Maritime Ser. Corp.,* but dodged the issue of whether a union-

negotiated waiver of a federal judicial forum for statutory claims of employment discrimination would be valid. 525 U.S. 70, 82 (1998). Instead, the Court found that the collective bargaining agreement ("CBA") in the case did not waive such rights: any such waiver must be "explicitly stated" and "clear and unmistakable." *Id.* at 80. The Court found it important that the CBA in question contained a general arbitration clause of "matters under dispute," incorporated a general intent that the contract not violate state or federal laws (rather than specifically incorporated certain statutes), and included a provision disclaiming anything not contained within the agreement as not part of the agreement. *Id.* at 80-81.

Because Defendant argues that the other Circuits are split on interpreting these issues of law, the Court will focus mostly on the law of this Circuit. The parties seem to agree the Fifth Circuit has not spoken specifically to the case at bar. The Fifth Circuit found generally that Title VII claims can be subjected to compulsory arbitration after *Gilmer,* though the case did not involve a union contract. *Alford v. Dean Witter Reynolds, Inc.,* 939 F.23d [sic] 229 (5th Cir. 1991). *Maddox v. Runyon* found no waiver where arbitration was not required by a union contract. 139 F.3d 1017 (5th Cir. 1998). Defendant calls upon the law of the Fourth Circuit to say that the "clear and unmistakable" requirement may be satisfied in two ways: an explicit arbitration clause by which the union submits all statutory employment discrimination claims to arbitration, or the presence of another provision like a nondiscrimination clause that makes it unmistakably clear that the discrimination statutes at issue are part of the agreement. *Brown v. ABF Freight Systems, Inc.,* 183 F.3d

319, 321 (4th Cir. 1999). The case continued that the language that the contract "covers employees with a qualified disability under the Americans with Disabilities Act" in the context of the preceding sentence that outlined other forbidden criteria for discrimination indicates that the ADA was not specifically incorporated, and thus, no waiver. *Id.*

Defendant argues that the contract in this case fulfills the second prong of another provision like a non-discrimination clause that makes it "unmistakably clear that the discrimination statutes at issue are part of the agreement." Defendant further cites the finding of the arbitrator that the ADA did not mandate Defendant to reasonably accommodate Plaintiff by having an assistant perform an essential part of Plaintiff's job which Plaintiff cannot perform himself (thus deciding an ADA claim).[52] Defendant argues that the specificity of the agreement is pivotal to whether the federal forum is waived. *Compare Jupiter v. Bellsouth Telecommunications, Inc.*, 1999 WL 1009829 (E.D.La.1999) (finding no bar where "the CBA does not make compliance with federal antidiscrimination statutes an obligation under the agreement") *with Clarke v. UFI, Inc.*, 98 F.Supp.2d 320, 332 (E.D.N.Y. 2000) (finding agreement "clear and unmistakable" where agreement included comprehensive discussion of sexual harassment as well as a binding arbitration clause).

Plaintiff does not dispute Defendant's reading of the applicable law. However, Plaintiff argues that the union contract does not waive Defendant's rights to a federal forum. First, Plaintiff notes that the disputes under the

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[52] Def's App. at 57.

contract "*may* be referred to arbitration" (emphasis added).[53] Plaintiff concludes that there is no mandatory arbitration, and no waiver of the right to file suit in federal court. Defendant counters that the distinction that the parties *may* arbitrate is irrelevant once the case is submitted to arbitration. The Court notes that the result of the arbitrator is made final and binding on the Company and the Union.[54]

The Court finds the *ABF Freight* case to encompass a situation most analogous to this case, and reaches the same conclusion that there is no clear and unmistakable inclusion of the ADA in the union contract that would waive Plaintiff's right to a federal forum. The contract contains three relevant provisions. Article 31 generally states that "there shall be no discrimination against any employee because of race, color, creed, national origin, age, sex, *disability* or veteran status"[55] (emphasis added). Article 33 entitled "Disabled Employees," Section 2 grants a worker who was disabled by occupational injury and cannot perform his job the right to be placed on another appropriate job.[56] Article 33 Section 3 provides in part, "This Contract shall be administered in accordance with the applicable provisions of the Americans with Disabilities Act." Though it is a close [sic] question, the Court does not see a "clear and unmistakable" intent to waive Plaintiff's federal forum. Section 2's listing of other substantive rights suggests that Section 3 be read not as

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[53] Def's App. at 6-7.

[54] Def's App. at 7.

[55] Def's App. at 9.

[56] Def's App. at 10.

an incorporation of Plaintiff's claims under the ADA, but as a means to interpret Section 2. Accordingly, it would be appropriate to import the definition of "disabled" from the ADA (as invoked by Section 3) into Section 2 to define Plaintiff's rights thereunder.

Further, the Court does not believe that Plaintiff's claims under the ADA were actually litigated and decided by the arbitrator. The precise question the arbitrator considered was "Did the company violate the collective bargaining agreement by refusing to return the grievant, Steve Middleton, to employment, as and when it did, following his injury at work on May 30, 1996? . . . "[57] The arbitrator made explicitly clear that Article 33, Section 2 "is the provision that Grievant alleges the Company has violated. . . . ", not Section 3 encompassing the ADA reference.[58] The contract and the arbitration decision both honor the distinction between the contractual and statutory claims that so consumed the *Gardner-Denver* court. Accordingly, Plaintiff has not waived his right to litigate his statutory claims in a federal forum.

C. THE ADA

The ADA prohibits employers like Ball-Foster from discriminating against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, hiring, advancement, or discharge of employees. 42 U.S.C. § 12112(a); *Turco v. Hoechst Celanese Corp.*, 101 F.3d 1090, 1092 (5th

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[57] Def's App at 42 (Arbitrator's Decision).

[58] Def's App. at 45.

Cir. 1996). A "disability" includes "a physical or mental impairment that substantially limits one or more of the major life activities of such an individual; a record of such an impairment; or being regarded as having such an impairment." 42 U.S.C. § 12102(2)(A)-(C); *Turco,* 101 F.3d at 1092. Being regarded as having an impairment means that the plaintiff: "(1) [h]as a physical or mental impairment that does not substantially limit major life activities but is treated by a covered entity as constituting such limitation; (2)[h]as a physical or mental impairment that substantially limits major life activities only as a result of the attitudes of others toward such impairment; or (3)[h]as none of the impairments defined [in the regulations] but is treated by a covered entity as having a substantially limiting impairment." 29 C.F.R. § 1630.2(l)(1)-(3).

"A person is 'regarded as having' an impairment that substantially limits the person's major life activities when other people treat that person as having a substantially limiting impairment." *Wooten v. Farmland Foods,* 58 F.3d 382, 385-86 (8th Cir. 1995); *McAlpin v. National Semiconductor Corp.,* 921 F.Supp. 1518, 1522 (N.D. Tex. 1996). The focus is on the impairment's effect upon the attitude of others. *Wooten,* 58 F.3d at 385-86. This provision is intended to combat the effects of "archaic attitudes," erroneous perceptions, and myths that work to the disadvantage of persons with or regarded as having disabilities. *Id.* The "regarded as" component of disability "is designed to protect against erroneous stereotypes some employers hold regarding certain physical or mental impairments that are not substantially limiting in fact." *Kocsis v. Multi-Care Management, Inc.,* 97 F.3d 876, 885 (6th

Cir. 1996). Under that provision, a 'plaintiff must show that the perceived impairment is a substantial limitation on a major life activity." *Id.*

"Substantially limits . . . means . . . [u]nable to perform a major life activity that the average person in the general population can perform; or [s]ignificantly restricted as to the condition, manner or duration under which an individual can perform a particular major life activity as compared to the condition, manner, or duration under which the average person in the general population can perform that same major life activity." 29 C.F.R. §§ 1630.2(j)(l)(i)-(ii); *Robinson v. Global Marine*, 101 F.3d 35, 36 (5th Cir. 1996), *cert. denied*, 117 S.Ct. 1820 (1997). One whose impairment merely affects one or more major life activities is not disabled. *Barfield v. Bell South Telecommunications, Inc.*, 886 F. Supp. 1321, 1324 (S.D. Miss. 1995).

"Major Life Activities means functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working." 29 C.F.R. § 1630.2(I); *Robinson*, 101 F.3d at 36. Other major life activities could include lifting, reaching, sitting or standing, 29 C.F.R. § 1630, Appendix to Part 1630 – Interpretive Guidance on Title I of the [ADA] § 1630.2(l); *Dutcher v. Ingalls Shipbuilding*, 53 F.3d 723, 726 (5th Cir. 1995), The EEOC's Interpretive Guidelines proclaim that an individual's ability to perform the major life activity of working should only be considered if the individual is not substantially limited in any other major life activity. 29 C.F.R. Part 1630, Appendix § 1630.2(j); *Barfield*, 886 F. Supp. at 1324.

"With respect to the major life activity of working . . . [t]he term substantially limits means significantly restricted in the ability to perform either a class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training, skills and abilities. The inability to perform a single, particular job does not constitute a substantial limitation in the major life activity of working." 29 C.F.R. § 1630.2(j)(3)(i); *Ellison*, 85 F.3d at 190; *Maulding v. Sullivan*, 961 F.2d 694, 698 (8th Cir.992) [sic], *cert. denied*, 507 U.S. 910 (1993). "Working" under the ADA "does not mean working at a particular job of that person's choice." *Wooten* 58 F.3d at 385-86. Nor is an individual "substantially limited in working just because he or she is unable to perform a particular job for one employer. . . . " *Foreman*, 113 F.3d at 1407.

I. PLAINTIFF'S DISABILITY

The Supreme Court recently laid out a three-step process for evaluating whether someone has a disability: first, whether the condition is a "physical impairment," second, whether the life activity affected is a "major" one, and third, whether the impairment "substantially" limits the major life activity. *Bragdon v. Abbott*, 524 U.S. 624 (1998). As noted above, major life activities include caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working. 29 C.F.R. § 1630.2(I); *Robinson*, 101 F.3d at 36. In addition, other major life activities could include lifting, reaching, sitting or standing. 29 C.F.R. § 1630, Appendix to Part 1630 – Interpretive Guidance on Title I of the [ADA] § 1630.2(l); *Dutcher*, 53 F.3d at 726.

Plaintiff's brief cites the opinion of Dr. Richard Raughton that Plaintiff suffers from status post lumbar laminectomy pain with acute exacerbations.[59] Plaintiff's physical impairment is not disputed. In response to direct question from Plaintiff's attorney, Dr. Raughton agreed that Plaintiff has a physical impairment that substantially limits major life activity.[60] In order to evaluate this conclusory statement, this Court must investigate the consequences of Plaintiff's condition and the evidence supporting it. In his brief, Plaintiff cites to Dr. Raughton's deposition to conclude that Plaintiff suffers from a substantial impairment of "lifting, bending, pushing, pulling, walking, driving and jogging."[61] The work limitation slip signed by Dr. Osborne specifically recommends "no *excessive* bending, no heaving pushing or pulling."[62] The slip recommended no heavy lifting over 25 pounds.[63] The Court considers these contentions.

The lifting restrictions placed on Plaintiff limit his lifting at his job to 25 pounds.[64] In *Pryor v. Trane Co.*, the Fifth Circuit approved of the holding of a Fourth Circuit case that "as a matter of law, . . . a twenty-five pound limitation . . . does not constitute a significant restriction on one's ability to life [sic], work, or perform any other major life activity." 138 F.3d 1024, 1027, *citing Williams v. Channel Master Satellite Systems, Inc.*, 101 F.3d 346 (4th

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[59] *See* Deposition of Dr. Richard Raughton, Pl's App. at 82.

[60] Pl's App. at 78.

[61] Pl's App. at 78-79; Plaintiff's Response at 15.

[62] Def.'s App. at 196.

[63] *Id.*

[64] *Id.*

Cir.1996) (citing the 8th Circuit), *cert. denied*, 520 U.S. 1240 (1997). Plaintiff does not respond to this contention. In accordance with the law of this circuit, this Court finds that Plaintiff's lifting restriction does not significantly impair a major life activity under the ADA.

Plaintiff is restricted from excessive bending, pushing, or pulling in the workplace. But Plaintiff provides no indication of what "excessive" means. The Court agrees with Defendant's common sense contention that an inability to perform such activities to excess is a common trait of all people. Plaintiff cites no law to indicate that Plaintiff's restrictions place him within the ADA's purview. These contentions do not make Plaintiff disabled under the ADA. The evidence cited by Plaintiff from Dr. Raughton also finds that Plaintiff cannot "walk a golf course" or jog.[65] Plaintiff's legal support for how these contentions support his ADA claim is absent. There is no evidence that jogging is a major life activity; many people who cannot jog are not disabled. There is no evidence to support that the inability to walk a golf course constitutes a disabled condition. Defendant's Reply notes that Plaintiff can take 30-minute or longer walks every day in the morning, and can do some household chores.[66]

Dr. Raughton's letter opines that Plaintiff should not pursue a job which would require driving farther than 25-30 miles.[67] First, Plaintiff shows no legal support to show that driving is a major life activity. The examples of

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[65] Pl's App. at 79.

[66] Deposition of Steve Middleton, Def.'s App. at 36-39.

[67] Pl's App. at 82.

"major life activities" available to this court represent the most basic of tasks, such as "reaching" and "walking." The Court cannot conclude from the examples listed above that a complex task such as driving rates as a "major life activity" the same as the other simple activities listed above. Indeed, such a finding would compel the Court to rule that anyone who has a substantial impairment in driving would have a disability under the ADA; the Court sees little logic or common sense in this conclusion, and certainly has seen no case support from Plaintiff. Plaintiff's doctor attempts to bring driving within the class of major life activities by suggesting we spend 15% of [sic] 20% of our time in a car, a figure that, even in Dallas, seems exaggerated. Further, the examples of major life activities listed above do not focus on the length of time spent on the activity, but rather their basicness to our existence as humans (e.g. breathing, speaking, learning). Even if driving is a major life activity, Plaintiff is not substantially limited, as he can still drive; he simply should not drive more than 25 or 30 miles at a time. Plaintiff's doctor does not tell us how long a recovery period the plaintiff would require (e.g. whether getting out to stretch would be sufficient to allow Plaintiff to continue). Nor does Plaintiff cite support to show that such a distance represents a substantial impairment of life activity, other than the doctor's bald assertion, nor does he discuss what the average or reasonable time is that a driver can drive without stopping. The driving restriction only applies to Plaintiff's job, which presumably would entail a daily commute of the distance twice per day. There is no evidence that the average person does not commute more than 25 or 30 miles per day, nor

does Plaintiff argue to the contrary. With perhaps 2000 square miles or more within Plaintiff's immediate sphere of driving, Plaintiff does not show any impairment in his life. Lastly, the Court notes that the doctor's written letter tempered his advice by stating that such driving would "compromise his fragile lower back injury" and "would not be beneficial in the long run for [Plaintiff];"[68] this statement strangely stops short of saying such driving would harm Plaintiff. Nor is there evidence from Plaintiff showing that the lack of beneficial effect of driving is any different than for the average person with whom Plaintiff is compared.

Plaintiff's brief also claims that Plaintiff has a "20% impairment rating," which appears in the Plaintiff's signed Declaration.[69] But Plaintiff's brief does not explain the meaning of this statement or how it affects the analysis of whether Plaintiff is disabled.

Defendant also contends, without response from Plaintiff, that just because Plaintiff may not have been able to perform the job of floor person/apprentice operator, for which changing the molds was an essential function, that fact alone does not establish a substantial limitation on the life activity of working. The Supreme Court has stated that "the inability to perform a single, particular job does not constitute a substantial limitation in the major life activity of working." *See Sutton v. United Air Lines*, 527 U.S. 471, 493 (1999), *citing* 29 C.F.R. § 1630.2(j)(3)(i). Plaintiff does not dispute Defendant's

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[68] Pl's App. at 82.

[69] Declaration of Steve Middleton, Pl's App. at 3.

contention that there are "a myriad" of other manufacturing jobs, including ones at Ball-Foster in the cold end, that are consistent with the restrictions upon Plaintiff.[70]

Plaintiff has not demonstrated through his brief that he has an impairment that substantially limits one or more major life activities. Therefore, he is not disabled under the ADA.

Defendant similarly challenges Plaintiff's contention that he has a record of disability, which would qualify Plaintiff under the ADA. This Court agrees with Defendant's challenge to the inadequacy of Plaintiff's showing of a record of disability. Plaintiff cites no evidence that Plaintiff's record differs at all from his contentions of disability, which the Court has already found to be legally insufficient. Therefore, Plaintiff has failed to show a record of disability.

Defendant also challenges whether Plaintiff was regarded as having an impairment under the ADA. Since the Court held as a matter of law that being unable to work the single floor person/apprentice operator position did not render Plaintiff disabled, then *a fortiori* Defendant's belief that Plaintiff could not work solely that position would not render Plaintiff "regarded" as disabled under the ADA.

To combat Defendant's claim, Plaintiff rests primarily on the contention that if Defendant was willing to put Defendant to work in other positions, it would have done

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[70] Def's Brief at 13.

so long before August 2, 2000. Plaintiff notes that Defendant declined to do so even though Plaintiff's doctor performed an FCE, and released Plaintiff for work after specifying other jobs he could perform in the cold end. Plaintiff cites the position of Defendant's employee Julia Kirchner that Ball Foster was concerned about liability in the event that Plaintiff could not safely perform his job.[71] Plaintiff's delay in returning to work is not disputed.

The Court looks for guidance to the *Colwell* case. *See Colwell v. Suffolk County Police Dept.*, 158 F.3d 635, 647 (2d Cir. 1998). The Court there entered summary judgment for the Defendants, finding that requiring the plaintiff candidates for promotion to submit to physical examinations, even where others were not required to do so, provided no basis that they were regarded as disabled where plaintiffs had earlier insisted that their physical limitations restricted what work they could perform. *Id.* at 647. The Court stated, "The fact that the County perceived a need to require the exams suggests no more that [sic] that their physical condition was an open question." *Id.* This case is instructive but not controlling, since the physical examinations in question evidently applied only to a specific job for which the plaintiffs had applied. *See id.* In our case, Plaintiff could have been regarded as disabled for a wide range of jobs within Ball Foster.

It is a close question as to whether a jury could reasonably infer that Defendant regarded Plaintiff as disabled. It is conceivable that Defendant simply did not

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[71] Pl's App at 27.

know whether Plaintiff was disabled, but did not necessarily regard him as such. Yet the Court concludes that Defendant's refusal to return Plaintiff to work in a wide range of jobs in the plant before receiving further medical testing or analysis, given that Plaintiff had already submitted evidence of his ability from his doctor, could reasonably support the inference that Plaintiff was regarded as disabled by Defendant. A jury would be entitled to disbelieve Defendant's contention that its refusal to permit Plaintiff to return to work was based on liability concerns rather than discrimination against someone that Defendant regarded as disabled. The jury must consider the question of whether Defendant regarded Plaintiff as disabled. Of course, just because there are no jobs available that fit Plaintiff's restrictions does not mean Plaintiff is regarded as being excluded from an entire class of jobs (and thus as disabled). *Pryor,* 138 F.3d at 1028.

The Court notes that, given Defendant's plausible reasons for requiring another medical examination and Plaintiff's intransigence in granting it, the evidence appears to strongly favor Defendant on the issue of whether Defendant discriminated against Defendant [sic] based on any disability he was regarded as having. The Fifth Circuit considered a claim that, assuming that the defendant considered the plaintiff to be disabled, the defendant had refused to place her [sic] in jobs that might have been available. *Deas v. River West, L.P.,* 152 F.3d 471, 481 n.23 (5th Cir. 1998). The Court required evidence that other jobs were available and that the plaintiff had applied for them (*Id.*); the evidence of other available jobs in this case would support such a contention. But Defendant does not argue for summary judgment based on

Defendant's conduct toward someone it may have regarded as disabled; accordingly, the court will not consider such evidence.

To be covered under the ADA, Plaintiff must also be a "qualified individual with a disability." 42 U.S.C. § 12111(8); *Turco v. Hoechst Celanese Corp.*, 101 F.3d 1090, 1092 (5th Cir. 1996). Such an individual, "with or without reasonable accommodations can perform the essential functions of the employment position that such individual holds or desires." 42 U.S.C. § 12111(8); *Turco*, 101 F.3d at 1092.

The Court considers the floor person/apprentice operator position that Plaintiff desired. It is undisputed that changing the molds is an essential part of the position, and that Plaintiff could not perform the function on his own. Plaintiff must thus prove he could do the job with reasonable accommodation. The accommodation suggested by Plaintiff's chiropractor of having another employee help Plaintiff change the molds is unreasonable as a matter of law. Eliminating an essential function of a job or redefining essential roles so that another employee substitutes for the disabled employee is not a reasonable accommodation. *See Bradley v. University of Texas M.D. Anderson Cancer Center*, 3 F.3d 922, 925 (5th Cir. 1993) (construing Rehabilitation Act of 1973);[72] *Newman v. Chevron, U.S.A.*, 979 F.Supp. 1085, 1091 (S.D.Tex. 1997); *Johnson v. City of Port Arthur*, 892 F.Supp. 835, 842 (E.D.Tex. 1995). Defendant argues that even if accommodation was legally

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[72] *See also Sutton*, 527 U.S. at 497 ("The [ADA's] definition of disability is drawn almost verbatim from the Rehabilitation At of 1973") (internal quotes omitted).

required, Defendant could not reasonably do so. Defendant contends it could not reasonably pass Plaintiff's mold changing responsibilities in the hot end to others.[73] Dennis Worrell, the plant Operations Manager, testified that having a floor person always on hand for Plaintiff is not feasible to the plant's operation since there is only one floor person who works during the day, and none work at other times.[74] The function of upkeep personnel is to relieve other personnel (presumably the operators) and to keep the hot end clean; they also occasionally change the molds.[75]

Plaintiff contends that Defendant's arguments fail for three reasons. First, when Osborn placed the "no mold changing" restriction on him, he did not realize that the molds did not have to be changed in one piece, but rather could be changed after breaking them down into three pieces which would each weigh no more than Middleton's 25-pound lifting restriction. This contention is unavailing, since Plaintiff has not shown that Defendant knew exactly why Middleton's doctor placed the no mold changing restriction on him. The evidence in the case indicates that Defendant was continually requesting more specific information than what it received. Further, even though Dr. Osborn testified that the floor person job was lighter than he had envisioned, Plaintiff's evidence of the weight of the plates is unclear that they were within the 25-pound limit; the 32-ounce mold broke down to a 24

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[73] Def's App. at 268-272.

[74] Def's App. at 268-271.

[75] Def's App. at 268-272.

pound piece, while the 40 ounce mold weighed a little more, according to Plaintiff's brief.[76]

Plaintiff's second refutation is that an "upkeep" was regularly available to assist with duties such as mold changes, so no additional work would be imposed on others. This statement is self-contradictory, since obviously anyone assisting Plaintiff would be doing work that they otherwise would not have done. As discussed above, it is not reasonable that another employee should have to assist Plaintiff every time he must change a mold, as would evidently be the case, nor is it even practical given that upkeep personnel act in relief of others, not as assistants to floor personnel.

Third, Plaintiff states that "the otherwise qualified" requirement is not limited to the former job, and there were at least five other "cold end" jobs identified by Middleton's doctor which Middleton could have performed. Plaintiff claims that light duty was available, at Defendant's discretion, during 1998 and 1999; the record implied that two weeks' light duty might have been available.[77] Plaintiff cites no law for this contention that Defendant must place Plaintiff in another job, and this Court believes the legal authority to lean the opposite direction. An employer has no duty to reassign the employee to any particular job, although it could not deny him alternative employment opportunities reasonably available under the employer's existing policies. *See*

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[76] Pl's App. at 37-39, 43-44. The Court does not see the discussion of the 40-ounce mold.

[77] Pl's App. at 29-30.

School Board of Nassau County v. Arline, 480 U.S. 289 n.19 (1987) (Rehabilitation Act); *Bradley*, 3 F.3d at 925. Creating a new job or changing an employee's essential functions, such as switching him to light duty when he has been a laborer, is not a reasonable accommodation. *See Port Arthur*, 892 F.Supp. at 842 (finding such changes to be a different job, not an accommodation of employment). Thus, since Plaintiff could not be reasonably accommodated in his former job, Defendant was not obligated to place him in another job, including light duty.

Defendant could not prevent Plaintiff from obtaining another job in the cold end for which he might be qualified. But Plaintiff fails to show that any of the cold end jobs that his doctor cleared him to take were actually available at the plant under Ball-Foster's existing policies. For March 1998, we have only Middleton's bare assertions that a repack or line attendant job was available.[78] The evidence cited by Plaintiff to show the availability of light duty jobs is unhelpful, for the jobs appeared to be merely temporary odd jobs given to employees with minor injuries.[79] Plaintiff also misquotes a witness as saying that a Mr. Martinez had worked longer than two weeks on light duty, when the context makes fairly clear that the witness said that he didn't know.[80] The one witness who comes close to showing that jobs were available for Plaintiff is employee and union officer Darrell Grounds, but in claiming that Middleton's seniority

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[78] Pl's App. at 4.

[79] Pl's App. at 40-44.

[80] Pl's App. at 44. Darrell Grounds did testify to this fact. Pl's App. at 71.

would have put him in a position where he could have been called in part time, Grounds admits he only knew Plaintiff's seniority approximately;[81] there is no showing that Plaintiff was not given a job that a more junior employee received. According to Grounds, employees were being recalled from layoff; the evidence is insufficient to show Middleton's proper order in being recalled.[82] Grounds testified that even with his level of seniority; Plaintiff would not have been able to protect his job from layoff.[83] The mere fact that people were working light duty jobs is of no consequence. Defendant's position was that Plaintiff did not have enough seniority to take a cold end job.[84] This contention is supported by Defendant's offer to return Plaintiff to work in the cold end once his seniority or experience was sufficient and a position was available, and once Defendant was satisfied as to Plaintiff's safety.[85]

Plaintiff's suggestion conflicts with the limited purpose of light duty stated by Julia Kirchner. Light duty is discretionary and is intended to ease injured employees back to work who evidently will be returning to full work soon; but Defendant's [sic] Julia Kirchner testified that she understood Plaintiff to have a permanent restriction that would prevent him from doing his job.[86] Thus, given the rationale behind light duty as a temporary stop before

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[81] Pl's App. at 67-71.

[82] *Id.*

[83] *Id.*

[84] Def's App. at 234.

[85] Def's App. at 248.

[86] *Id.*

returning to regular work, there was no reason to use temporary work to ease Plaintiff back into a job he could never return to or which was not available given his seniority.

Plaintiff also contends as a legal matter that after an employer knows of a disability and the employee requests accommodation, if the employer fails to engage in a dialogue to determine what accommodations are necessary, they have failed to reasonably accommodate under the ADA. *See Loulseged v. Akzo Nobel, Inc.*, 178 F.3d 731, 735-36 (5th Cir. 1999). But since this Court found that Plaintiff is not otherwise qualified under the ADA, there is no reasonable accommodation, and thus no need for discussion. The Court is very skeptical whether this claim would survive summary judgment even if accommodation were necessary given Defendant's abundant communications with Middleton.

2. ADA RETALIATION CLAIM

The ADA prohibits an employer from discriminating against an employee who has made a charge or participated in a proceeding under this act. See 42 U.S.C.A. § 12203. "To show an unlawful retaliation, a plaintiff must establish a prima facie case of (1) engagement in an activity protected by the ADA, (2) an adverse employment action, and (3) a causal connection between the protected act and the adverse action." *Seaman v. CSPH, Inc.*, 179 F.3d 297 (5th Cir. 1999). "Once the plaintiff has established a prima facie case, the defendant must come forward with a legitimate, non-discriminatory reason for the adverse employment action." *Id.* If such a reason is

advanced, the plaintiff must adduce sufficient evidence that the proffered reason is a pretext for retaliation, and must show that "but for" the protected activity, the adverse employment action would not have occurred. *Id.*

According to the interrogatory answers cited by Defendant, Plaintiff claims that Defendant retaliated against him by not permitting him to return to work when he wanted, refusing to make accommodations for him to return to work on light duty, and giving him verbal and written discipline beginning in January 1998 after placing him on a machine with which he was not familiar.[87] Defendant disputes the third prong of the test for retaliation: whether there is a causal connection between Plaintiff's actions protected by the ADA and the Defendant's actions complained of above.

The Court will assume *arguendo* that Plaintiff has made a *prima facie* case. Defendant again explains its refusal to return Plaintiff to work where he wished by citing the "confusing and contradictory information" from Plaintiff's chiropractor, and Plaintiff's failure to cooperate with Defendant to allow his FCE to be given to Baylorworx for comparison with the functions of the various jobs in issue. The Court also recalls Defendant's liability concerns in allowing an injured employee to return to work he could not handle. Having produced a non-discriminatory reason for its actions, the burden shifts to the Plaintiff to show that these reasons are a pretext for retaliation. The Court notes that Plaintiff does

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[87] Def's App at 173.

not argue that Plaintiff's threatened 3-day suspension was retaliation by Defendant.

Plaintiff further cites Defendant's continual "delay tactics" in requiring progressively more information from Plaintiff without tangible results in Plaintiff's employment. Plaintiff asserts that he submitted four work releases in mid-1998 before Defendant inquired with Plaintiff's doctor as to which jobs he could handle.[88] Plaintiff cites Dr. Osborn's identification of 5 or 6 jobs Plaintiff could perform, followed by Kirchner's refusal to permit Plaintiff to return to work and request for more specific information and an FCE, followed by further requests for information, including a medical release form, which Plaintiff contends he provided.[89]

The Court cannot discern any attempt at retaliation against Plaintiff. Defendant had a legitimate concern about the safety of Middleton and the liability of Ball-Foster should Middleton be hurt again in a job for which he was not qualified. It was thus reasonable for the Defendant to desire medical evidence of Plaintiff's capacity to work in his previous job or any other job within the plant. Defendant's reluctance to accept the opinion of Dr. Osborn is entirely reasonable in light of his abrupt change in diagnosis of Plaintiff from permanently disabled to temporarily restricted from work. This change coincided with the denial of Plaintiff's application for permanent disability benefits: Plaintiff applied for permanent disability benefits on April 15, 1998, but only a few

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[88] Def's App. at 114, 196, 198-99.

[89] Pl's App. at 14.

weeks later on May 8, 1998, Dr. Osborn radically changed his diagnosis. It was reasonable for Defendant to suspect that the change in diagnosis might have resulted from Dr. Osborn's knowledge that Plaintiff's benefits application had been denied. A merely temporary restriction might also have made Plaintiff eligible for light duty. Defendant was justified in seeking a second, independent opinion and had ample reason to do so. Defendant's request was not intended to unduly obstruct Plaintiff's return to work; when Plaintiff objected to Defendant's suggestion that Baylorworx perform Middleton's FCE, Defendant acceded to Plaintiff's request and permitted Sargent to perform the FCE. It was only when it became apparent that the Sargent FCE was based upon the opinions of the same Dr. Osborn that Defendant pressed for another, truly independent evaluation. The Court notes that Defendant frequently initiated the correspondence between the parties, indicating a willingness to resolve the questions of Middleton's fitness for work.

It is not clear that in March 1998 Plaintiff requested anything other than his old job in the hot end, for which it is not refuted that Plaintiff's ability to work the hot end job was affected by his condition. It is reasonable that Defendant would not look for another similar job when Plaintiff was found to be permanently disabled from working that job. Plaintiff did not adequately show eligibility for any cold end jobs based either on his ability, his seniority, or the availability of those jobs. Defendant was willing to drop its request for an independent FCE, but still wanted their doctors at Baylorworx to evaluate Plaintiff's earlier FCE results. Defendant's caution in seeking a release from Plaintiff for Baylorworx to view Plaintiff's

FCE and medical records is reasonable, as Defendant clearly felt it needed a release for the FCE itself in addition to any general release that may have existed. It is not just Defendant who caused delay in Plaintiff's return to work; Plaintiff delayed in responding to Defendant's requests, and quarreled with whether a release had been given but refused to simply grant a new release. Defendant initiated Plaintiff's eventual return to work in the cold end.

Even if Plaintiff's alleged facts are believed, the Court cannot conclude that a reasonable jury could find that Plaintiff had fulfilled his burden of proof.

D. WORKER'S COMPENSATION RETALIATION CLAIM

Defendant moves to dismiss Plaintiff's worker's compensation retaliation claim under Texas Labor Code § 451.001. A person may not discharge or in any other manner discriminate against an employee because the employee has: (1) filed a workers' compensation claim in good faith; (2) hired a lawyer to represent the employee in a claim; (3) instituted or caused to be instituted in good faith a proceeding under the Texas Workers' Compensation Act; or (4) testified or is about to testify in a proceeding under the Act. *Id.* A causal connection is established between a plaintiff's protected action and a defendant's retaliation if but for the employee's action, the adverse employment action would not have occurred when it did. *See Continental Coffee Products v. Cazarez*, 937 S.W.2d 444, 450-51 (Tex. 1996). The employee need not prove that participation in the protected activity was the sole cause

for the adverse employment action. *Id.* at 451 n.3. The causal connection may be established by circumstantial evidence or by the reasonable inferences drawn from the evidence. *Id.* at 451. Once the causal link is established, the employer must rebut the allegation by showing a legitimate reason for the discharge. *Id.* Evidence that an employer's stated reason is false could support a finding of a violation of the statute. *Id.* at 452.

The Court finds much of the same evidence that was probative to the ADA retaliation claim to apply to the Worker's Compensation retaliation claim as well. Consequently, the Court will not rehash the entire discussion. In support of this state law claim, Plaintiff cites Defendant's failure to return him to work for two years as a violation of company policy. The delays in Plaintiff's return to work have already been fully addressed. But Plaintiff's claim cannot stand for a further reason. The connection between the filing of Plaintiff's worker's compensation claim and the actions of Defendant are far too attenuated to support a judgment in Plaintiff's favor. Plaintiff filed his claim in September of 1996. Yet there is no evidence that this claim hindered Plaintiff's return to work in early January 1998 after his recuperation. Defendant's actions in not returning Plaintiff to work did not occur until after Plaintiff's injury flared up again shortly after returning to work, and he began seeing Dr. Osborn. The events are too remote in time and circumstance to support Plaintiff's claim.

Plaintiff cites generally Defendant's negative attitude toward Plaintiff during the two years after he returned to work from surgery, left again, and sought reinstatement;

manifestations of such attitude included verbal and written warnings. Expression of a negative attitude toward Plaintiff's injured condition or the failure to adhere to established company policies can support the finding of a causal connection. *See Paragon Hotel Corp. v. Ramirez*, 783 S.W.2d 654, 658 (Tex. App. 1989). But Plaintiff admitted in his deposition that he could think of no other reason for his warnings other than that he did not do a good enough job cleaning up.[90] Defendant notes that there is no evidence that anyone commented about Plaintiff's claim specifically or reacted negatively to it.

The Court holds as a matter of law that no reasonable jury could find that Defendant unlawfully retaliated against Plaintiff and would not have acted as it did but for Plaintiff's filing of a claim.

CONCLUSION

Having carefully considered the parties' arguments, the summary judgment evidence, and pertinent authorities, the Court concludes that Defendant's Motion to Dismiss should be DENIED, and Defendant's Motion for Summary Judgment should be GRANTED against all of Plaintiff's claims.

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[90] Def's App. at 27-29.

So Ordered.

This 2nd day of February, 2001

/s/ Jorge A. Solis
JORGE A. SOLIS
United States District Judge

EXHIBIT

A

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

STEVE MIDDLETON, *Plaintiff,*	§	**CIVIL ACTION NO. 3:CV-99-0964-P**
V.	§	
BALL-FOSTER GLASS CONTAINER CO., L.L.C. *Defendant.*	§	

COUNTY OF DALLAS)
)
STATE OF TEXAS)

DECLARATION OF STEVE MIDDLETON

I, Steve Middleton, make the following Declaration. I am aware that this Declaration will be filed in a federal court and that it is the legal equivalent of a statement under oath. All of the matters expressed herein are true and correct and are of my personal knowledge. I am the Plaintiff in the above-styled case and I hereby state the following:

I began working for the Defendant, Ball-Foster Glass Container Company, on or about December 5, 1988. I have performed a variety of jobs during my tenure with the Defendant. I began working as a pallet loader. I also worked as a box maker, a line attendant and auditor and

all of the "cold end" jobs (except for lehr sample). The plant was divided into the "hot end" and the "cold end". The "hot end" jobs involved forming molten glass into bottles using machines. "Cold end" jobs involved inspecting, packing and storing the bottles. I am currently working as a Line Attendant, which is a "cold end" job. I started working in this position on August 2, 2000. Prior to working as a Line Attendant, I worked as a Floor person/Apprentice Operator in the "hot end" of the plant.

On or about May 30, 1996, I was injured during the course and scope of my employment with the Defendant. I injured my back when I was pulling the grates out on the front of the machine I was working on. I reported this injury to Tom Sharpe, my supervisor on the day of the injury. Although I was injured, I did not miss time from work or seek medical treatment at that time.

At the time I was injured, I was working as a Floor Person/Apprentice Operator. This was a "hot end" job, which involved running the machines, keeping the machine operating, maintenance of equipment on the floor, taking care of defects, blank changes, mold changes, cleaning machines, keeping equipment stored, filling the ovens with the molds, making sure the floor was clean, painting, wiping down pipes, keeping the floor dry where oil drained out of the machines, making sure the operators had what they needed to run the machines and and relieving the Operators on the machines when they took breaks. Also, an "Upkeep" person works in conjunction with the operator making repairs and keeping the machines running. Once an Apprentice Operator accumulates 4000 working hours, he

becomes an Operator. As of September 1996, I had accumulated approximately between 2500 and 3000 hours as an Apprentice Operator and was working toward becoming an Operator.

I initially was seen by a company docto. Dr. Bousquet, for an evaluation of my back injury. In late August 1996, Dr. Bousquet referred me to Dr. Garrison for evaluation. On or about August 30, 1996, I was examined by the company doctor, Dr. Garrison, at BaylorWorx (a medical clinic in Waxahachie where employees of the Defendant are sent for treatment of on-the-job injuries). Dr. Garrison informed me that MRI's were expensive and that if my back was that bad, I would not have been able to walk into his office. Dr. Garrison commented that it looked like I had learned to live with my injury very well. Dr. Garrison wrote me a prescription and released me to work with no restrictions on September 3, 1996. I provided this full duty release to the Defendant and resumed working.

However, a few days later, on or about September 7, 1996, I went to the emergency room at Baylor Hospital because I was unable to get out bed due to my back pain. After being treated at the emergency room, I was referred to Dr. Bousquet. It was my understanding from the treating doctor at the emergency room that I was to see Dr. Bousquet for an MRI. I went to see Dr. Bousquet the next day. Dr. Bousquet took me off of work and an MRI was performed on me. I was diagnosed with an 11-millimeter herniated disk in my back at L4-L5. I then went to Dr. Callewart for an opinion on whether I needed back surgery. After Dr. Callewart recommended back surgery, I went to another doctor, Dr. Richard Hubbard, for a second opinion and he also recommended surgery. I had

back surgery on January 15, 1997. Dr. James Moody performed the surgery.

On or about September 21, 1996 (and again on the new form on September 30, 1996), I filed a [sic] an Employee's Notice of Injury and Claim for Compensation with the Texas Workers' Compensation Commission in connection with my May 30, 1996 injury. I then began receiving workers' compensation benefits.

After my surgery, I went to therapy and work hardening at the Rebuild Injury Rehabilitation Center in Waxahachie, Texas.

In approximately October 1997, I reached MMI and was given a 20% impairment rating by Dr. Lett. The 20% impairment rating was not disputed by the Defendant's workers' compensation insurance carrier until after I returned to work in January 1998. (This dispute was dismissed as being untimely.) Also, at the recommendation of Dr. Bousquet (company doctor), I had an FCE (Functional Capacity Evaluation) performed at BaylorWorx in December 1997. It is my understanding from Cathleen Moore with BaylorWorx, that the FCE showed I was able to perform medium level work.

After being released to return to work with no restrictions by Dr. Bousquet and Cathleen Moore, I returned to work on or about January 5, 1998. I returned to work in my previous Floor Person/Apprentice Operator position.

When I returned to work on January 5, 1998, Plant Operations Manager, Dennis Worrell, told me to take it easy because of my injury and to get accustomed to the new changes that had been made in my absence. The next day,

on January 6, 1998, I was given a verbal warning from my supervisor, Ed Johnson, for not cleaning the glass off the floor. Johnson's name was on the cleaning inspection sheet for that week which he got [sic] low rating of 50%. Johnson gave only me the verbal warning, even though there were other employees that were responsible for cleaning the floor. In addition, I was put on a machine that I was unfamiliar with. This machine, an unqualified bottle machine for wide-mouth bottles, was physically difficult to operate and should have been run by an operator who had more accumulated work hours than I did and who had not recently returned from a back injury. The next day, January 23, 1998 I was written up for poor performance by Ed Johnson, my supervisor. Later, Johnson personally told me that I was not supposed to be put on that machine. These warnings came just after I returned to work from being off for my work related injury.

After returning to work in January 1998, I missed some days in January and February due to difficulties I was having with my pain medication for my back injury. I provided the Defendant with a doctor excuse for these absences. I was seen by Dr. Bousquet in connection with these absences.

On or about March 2, 1998, I changed treating physicians to Dr. Charles Osborn. After receiving approval from the Texas Workers' Compensation Commission, I began seeing Dr. Charles Osborn for treatment of my back. I was experiencing a lot of pain and swelling in my back. On or about March 27, 1998, Dr. Osborn placed me on permanent light duty restrictions (See also Def. Appdx. 114). Based on these restrictions, I was restricted from lifting

over 25 pounds, excessive bending, pushing and pulling. (See also Def. Appdx. 114). Dr. Osborn also indicated that I would need to change jobs. (See also Def. Appdx. 114). I was diagnosed with post-laminectomy syndrome. (See also Def. Appdx. 114).

On or around March 27, 1998, I attempted to return to work. I presented to Julia Kircher [sic], Human Resource Manager, my release to return to work with permanent light duty restrictions from my treating physician, Dr. Charles Osborn. Kirchner left with the slip. When Kirchner returned, she told me to go home and she would call me when they had a job for me. I was not permitted to return to work until August 2, 2000.

In March 1998, even with my restrictions, there were available jobs which I could have performed at the plant. Specifically, I could have performed the repack position or worked as a line attendant. The repack position was a "cold end" job that involved inspecting bottles that have been identified by auditors as having defects as they came out of the palletizer. The line attendant position, a "cold end" job, involved keeping the lines unjammed, sweeping glass and keeping the floor clean. I was not offered either job or any other light duty job, either with or without reasonable accommodation.

As I was not permitted to return to work by the Defendant because of my injury and disability, and I had a family to take care of, I sought disability benefits through the Defendant's disability plan. In connection with this application, I filled a "Statement for Continuance of Life Insurance During Total Disability". On or about April 15, I filled out this form based on my understanding of my

limitations at that time. I also had Dr. Osborn complete the medical portion of this form, which he did on April 20, 1998.

According to Kirchner, I was denied disability benefits because I had not been employed for ten years with the Defendant. I did inform Dr. Osborn that I was not eligible for disability benefits, but I did not ask him to change my restrictions because of that. I do not recall when I learned that I was not eligible for disability benefits, but I learned it from Kirchner.

On or about May 4, 1998, Dr. Osborn examined me and changed my restrictions from permanent to temporary (for 8 weeks) effective May 8, 1998. (See also Def. Appdx. 196; Appdx. D 118-19). Dr. Osborn also determined that I would not need to change job positions. (Def. Appdx. 196). These restrictions included no lifting over 25 pounds, no excessive bending, and no heavy pushing or pulling. (Def. Appdx. 196). With these restrictions, I would have been able to perform my previous Apprentice Operator/Floor Person job with reasonable accommodations, such as having one of the upkeeps assist me if I needed help lifting, or changing the molds. I also could have been placed in a light duty job, such as repack or line attendant. I again presented my work release to Kirchner, who again refused to permit me to return to work.

I also began seeing Richard Raughton, D.O. for medical treatment in connection with my 1996 on-the-job injury in May 1998. Dr. Raughton prescribed pain medication for me, and I continue to see him on an as needed basis (approximately every two months).

Dr. Osborn provided me work permit slips for temporary light duty on June 25, 1998 (for six weeks) and on July 27, 1998 (for eight weeks). (See also Def. Appdx. 198-99). I presented these work release slips to Kirchner; however, she continued to refuse to allow me to work, either with or without reasonable accommodations.

After Kirchner would not permit me to return to work after Dr. Osborn provided her with a list of specific jobs I could perform, I contacted Kirchner to discuss what I needed to do to return to work. I tape recorded this telephone conversation (attached as Ex. A-1 is a true and correct copy of the transcription of this tape which was also an exhibit at my arbitration hearing). In this conversation, Kirchner admitted that Osborn had given her the answers she had asked for, but she still wanted more details to make sure I "could do every single thing in that job, and not just the general well, yeah, he can do it. . . . " (See also Appdx. A-1).

Because Kirchner was requesting another FCE in September 1998, I called the workers' compensation insurance carrier and asked if I had to have the FCE performed at BaylorWorx. It was my understanding from the workers' compensation commission that it did not matter where I had the FCE performed, and that the computerized FCE machine at Sargent Rehabilitation Clinic was state of the art. I then called Kirchner and asked her if the FCE could be performed by Sargent Rehabilitation and Injury Clinic rather than BaylorWorx. I did not want BaylorWorx to perform the FCE because they employed Dr. Garrison, the company doctor that had previously released me to

return to work without restrictions and without performing an MRI when I had a herniated disk. Also, Baylor-Worx had only a manual FCE as opposed to a computerized FCE machine (which Sargent's had). Kirchner approved my request to have Sargent's perform the FCE. On or about September 23, 1998, I had the FCE performed by Sargent on their computerized FCE machine. (See Def. Appdx. 217). As a result of the FCE, Dr. Osborn found that I was capable of performing the 5, and possibly 6, "cold end" jobs he had previously approved. (See also Def. Appdx. 218).

Despite having the FCE performed as Kirchner requested and approved, and despite Dr. Osborn's consistent opinion that I was capable of returning to work, the Defendant still refused to permit me to return to work. Kirchner wrote to Dr. Osborn in November 1998, and told him she needed further clarification of the FCE results before she could determine whether I could return to work. (See Def. Appdx. 225).

In January 1999, Dr. Osborn made a tour of the plant where I had worked at my request because Billy Webb (union representative) instructed me that that was what Kirchner had claimed was needed to get me back to work. In a January 20, 1999 letter to Kirchner, Dr. Osborn concluded that I could return to work as a Floor Person/ Apprentice Operator if I did not have to change out molds. (See also Def. Appdx. 226). Dr. Osborn also stated that I could perform various "cold end" jobs (lehr sampler, repack and auditor) if I did not have to lift heavy rolls of plastic or perform excessive bending. (See also Def. Appdx. 226). I also could have performed the Line Attendant job.

The apprentice operator/floor person job involves working with molds. A mold is the piece of equipment that actually shapes the bottle. The molds come in various sizes for making 7 ounce, 12 ounce, 32 ounce and 40 ounce bottles. Regardless of the size of the mold, the mold breaks down into three parts and the parts are within my weight restrictions. When working with the molds, a four wheel cart is used to transport the mold. The cart is rolled over to the oven. The mold is taken out of the oven by the Operator or the Upkeep by sliding it out. The mold is then broken apart and cleaned. The mold is then rolled over to the machine and installed on the machine. Often, when I worked as an Apprentice Operator, an upkeep person, who were regularly available, performed the mold change for me. When removing the mold from the machine, it must be removed in pieces, as opposed to as a single unit. Also, there are three machines in the "hot end", each one running various sized molds at various times. The Defendant determined which operator or apprentice operator ran which machine at which time.

Still allegedly not satisfied with Dr. Osborn's release, Kirchner again did not put me back to work. Kirchner told me there was no light duty work available in the plant and I could not return to my former job.

During my employment with the Defendant, and prior to my May 1996 injury, I had worked light duty jobs. This included providing numbers from the machines to the upkeep. I also observed other employees performing light duty work, including repack work, painting. Currently, I am a Line Attendant.

On March 8, 1999, Kirchner wrote to me and informed me the company had a [sic] performed a job analysis and wanted to match my ability with the essential job functions. (See also Def. Appdx. 234). Despite Dr. Osborn's multiple return to work releases (the most recent in January 1999 after he toured the plant), Kirchner wanted me to sign an authorization to have an unidentified third party review my September 1998 FCE to determine if there were jobs I could perform. (See also, Def. Appdx. 234-35).

My attorney responded to Kirchner's request and explained that I had been released to return to work by Dr. Osborn and that she had provided no explanation as to why his opinion was not acceptable or who the third party was. (See Def. Appdx. 236). The Defendant's attorney responded that it wanted BaylorWorx to make the job assessment and that it viewed Dr. Osborn's reports as contradictory. (See Def. Appdx. 238-39). For the same reasons I did not want BaylorWorx to perform my FCE, I did not want them to now review it and make a determination of my ability to work.

On April 28, 1999, I filed the present lawsuit based on discrimination under the Americans With Disabilities Act and Section 451.001 of the Texas Labor Code.

After my lawsuit was filed, I received a letter dated July 19, 1999 from Todd H. Glawe, the Human Resources Manager for the Defendant after Kirchner changed locations. (See Def. Appdx. 248). Glawe informed me that I was eligible for a "cold end" job, but that the company needed to determine what jobs I could safely perform and that I needed to have another FCE performed by the

company doctor. (See Def. Appdx. 248). For the same reason I did not want BaylorWorx performing the September FCE, I did not want them performing one now. Likewise, I did not want BaylorWorx to determine my ability to return to work. I informed the Defendant that I would not report to BaylorWorx for evaluation.

I was informed in a September 21, 1999 letter from Glawe that I was being suspended for refusing to report to BaylorWorx for evaluation. (See Def. App. 251). In response to this notice of suspension, my attorney informed the Defendant if they would not accept Dr. Osborn's reports, I would submit to additional medical evaluation by a competent medical provider, but that I would not submit to evaluation by BaylorWorx (for the previously stated reasons). (See Def. Appdx. 252-53). My attorney also informed the Defendant that had they wanted an independent medical exam, they could have requested one under Rule 35 of the Federal Rules of Civil Procedure. (See Def. Appdx. 252).

The Defendant responded by stating that they now needed a letter from Dr. Osborn stating that the FCE was unchanged and they needed a medical records authorization before I could be returned to work. Nearly a month sooner, I had provided the Defendant with a medical records authorization in response to Defendant's Request for Production in this case. Also, I had provided BaylorWorx an authorization to obtain medical records on me in 1996.

Although having the medical records authorization for approximately 10 months, at the time my deposition was taken in this case in June 2000, the Defendant was still

maintaining that I had not provided a medical authorization. My attorney wrote to the Defendant on June 13, 2000, after my deposition and confirmed that I had previously provided the medical authorization. (See Def. Appdx. 255-56). My attorney also reminded Defendant that I had provided Kirchner by and through Metropolitan Life Insurance with a medical authorization in 1998. (See Def. Appdx. 255). My attorney again reiterated that no request for a medical exam had been made that was mutually agreeable to the parties, and reminded the Defendant of my concerns about returning to Baylor-Worx. (Def. Appdx. 255).

On June 26, 2000, I was offered reinstatement in a Utility/Laborer position by the Defendant. (See also Def. Appdx. 261). I returned to work on August 2, 2000, but was assigned to work as a Line Attendant. I worked as a Line attendant from August 2 to August 5, 2000. On August 7th I was assigned to work in repack, which is a light duty job that I had requested as early as March 1998. On or about August 8, 2000, I was told by my supervisor, Hugh Owens, that I would start training on a Line Attendant job. I am currently working as a Line Attendant. Also, Todd Lee, a "hot end" manager told me that I would never be put back to work in the "hot end".

I declare, under penalty of perjury, that the forgoing is true and correct. Executed this 16th day of August, 2000.

/s/ Steve Middleton
Steve Middleton

EXHIBIT A-1

IN THE MATTER OF ARBITRATION BETWEEN GLASS, MOLDERS, POTTERY, PLASTICS AND ALLIED WORKERS INTERNATIONAL UNION, AFL-CIO, CLC

AND

BALL-FOSTER GLASS CONTAINER CO., L.L.C.
GRIEVANCE: VIOLATION OF ARTICLE 33
GRIEVANCE NO. 125-35-98

TAKEN ON APRIL 10, 2000

VOLUME 1

[2] IN THE MATTER OF ARBITRATION BETWEEN GLASS, MOLDERS, POTTERY, PLASTICS AND ALLIED WORKERS INTERNATIONAL UNION, AFL-CIO, CLC

AND

BALL-FOSTER GLASS CONTAINER CO., L.L.C.
GRIEVANCE: VIOLATION OF ARTICLE 33

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ALSO PRESENT:
Billy F. Webb, Executive Officer
Stan Winters, President
Steve Middleton, Grievant
J.D. Grounds, Financial Secretary and Business Committeeperson
Milford Jordan, Business Committeeperson
Thomas L. McKnight, Director, Labor Relations
Julia Kirchner, Quality Systems Specialist
Todd Glawe, Human Resources Manager

* * *

Middleton: 9/4/98 at 3:33 p.m., trying to get in touch with Julia Kirschner for the ___ time today.

Toby: Ball-Foster Glass, this is Toby.

Middleton: Is Julia Kirschner in? This is Steve Middleton.

Toby: I think she is now, hold on.

Kirschner: Hello, Steve.

Middleton: Julia.

Kirschner: Hey.

Middleton: How are you?

Kirschner: Fine.

Middleton: Good.

Kirschner: What's up?

Middleton: Well, the other day when I talked to you on the phone I was kind of disgruntled. I've got an uncle that died in Arkansas.

Kirschner: Oh, no. Sorry.

Middleton: What is it exactly that I need to do?

Kirschner: You don't need to do anything. I faxed that information to Dr. Osborne.

Middleton: Umm hmm.

Kirschner: Okay, and what he needs to do is and it says in the letter is be more specific as far as telling us what – how much you can lift or how much you can bend or squat or climb or whatever and then write a prescription for you for an FCE and that's all he has to do. Once he does that we set up an appointment for you at Baylor Works and then after that then, you know, whatever they say we'll go from there.

Middleton: Okay.

Kirschner: And that's it.

Middleton: So –?

Kirschner: And I faxed that yesterday afternoon.

Middleton: Okay. So, yeah, see I don't see him until Tuesday.

Kirschner: Okay.

Middleton: So all the other stuff that me and you and Darryl had talked about, that could be just faxed over that I could do this certain job or this certain job, all that's gone out, right?

Kirschner: No, it hasn't gone out. Cause he responded – what we had wanted and maybe I didn't

ask it clearly enough, is for him to say like for example I guess one of them was, shoot I don't even remember what they were, like line attendant for example.

Middleton: Right.

Kirschner: Let's say he said I think Steve Middleton can do line attendant job. Well we want to know well why does he think that, can he do all of it, can he do it because he can lift this much weight or this – you know, can he stand or does he have to sit every so often or things like that, rather than what he did is gave us a list of like four jobs that he thought you could do, but that was too vague and so that's the only reason, that's the only thing.

Middleton: Okay, so he just didn't answer y'all right?

Kirschner: He gave us the answer and actually I guess in a way he gave us what we asked for but because of what we've received from other doctors, we kind of thought he would be a little more detailed. So I just told him in the letter. I said you know we appreciate his response but we'd like a few more details so we can make sure that you can do every single thing in that job and not just the general well, yeah, he can do it, you know, pretty much type of thing. So that's all.

Middleton: Okay. Well, that's what I was wondering.

Kirschner: Okay.

Middleton: Because I was just – I just been in a pretty weird state of mind anyway.

Kirschner: Oh, yeah, well I'm sorry that that happened.

Middleton: Oh, well, it's just one of those things that happens, you know.

Kirschner: Yeah.

Middleton: It was a distant uncle anyways. It wasn't someone that I was very close to. And we can't afford to make the trip up anyway so it didn't make a difference. I can't ride that far and we can't go that far, so what can I say. That's just life.

Kirschner: Okay. Well hang in there. So, I guess –

Middleton: But anyway, that's what I was wondering.

Kirschner: Okay.

Middleton: Is what I was going to have to do. Whether I was going to have to do something special or what it was I was going to have to do.

Kirschner: No, the only thing you'll have to do is once we get his response and the prescription, we'll set up an appointment for you and you'll just have to you know go to the appointment and that's it.

Middleton: Okey doke.

Kirschner: Alrighty?

Middleton: Alright.

Kirschner: Thanks. Bye.

Middleton: Bye. [End of conversation.]

IN THE MATTER OF ARBITRATION BETWEEN GLASS, MOLDERS, POTTERY, PLASTICS AND ALLIED WORKERS INTERNATIONAL UNION, AFL-CIO, CLC

AND

BALL-FOSTER GLASS CONTAINER CO., L.L.C.
GRIEVANCE: VIOLATION OF ARTICLE 33

GRIEVANCE NO. 125-35-98

TAKEN ON APRIL 10, 2000

VOLUME 1

This is to certify that I, KRISTA WAGNER, reported in shorthand the proceedings given at the time and place set forth in the caption hereof, and that the above and foregoing 280 pages contain a full, true and correct transcript of said statement.

CERTIFIED TO on this the 25th day of April, 2000.

/s/ KRISTA WAGNER
KRISTA WAGNER, CSR
Certified Shorthand Reporter
Certification No. 6251
Expires 12/31/01

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Supreme Court, U.S.
FILED
MAY 16 2002

No. 01-1554

IN THE

Supreme Court of the United States

STEVE MIDDLETON,

Petitioner,

v.

BALL-FOSTER GLASS CONTAINER CO., L.L.C.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED IN RESPONDENT'S BRIEF IN OPPOSITION

1. Are the "Questions Presented for Review" proffered by Petitioner premised upon "factual" assertions that were rejected by the courts below?

2. Was Petitioner "disabled" with the meaning of the Americans With Disabilities Act of 1990, 42 U.S.C. § 12102(2)?

3. Was Petitioner a qualified person with a disability within the meaning of the Americans With Disabilities Act, 42 U.S.C. § 12111(8)?

4. Assuming for the sake of argument that Respondent had a duty to engage in a reasonable accommodation "interactive process" with Petitioner with respect to his coming back to work after his injury, did Respondent fulfill that "duty" within the meaning of the Americans With Disabilities Act, 42 U.S.C. § 12111(9)?

5. Was Petitioner "retaliated against" within the meaning of the Americans with Disabilities Act, 42 U.S.C. § 12203(a)?

6. Did the United States Court of Appeals for the Fifth Circuit ("Fifth Circuit") properly state the rules of law set forth by this Court in *Toyota Motor Mfg., Ky., Inc. v. Williams*, 122 S. Ct. 681 (2002)?

7. Did the Fifth Circuit "ignore" Petitioner's evidence?

8. Does the Petition raise any issue warranting review by this Court?

STATEMENT PURSUANT TO RULE 29.6

Respondent, Ball-Foster Glass Container Co., L.L.C., is a wholly owned subsidiary of Saint-Gobain Corporation.

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I. OPINIONS BELOW

The opinions of the District Court and the Court of Appeals are reproduced as Appendix A, Appendix B and Appendix C to the Petition ("Pet."; "Pet. App."). The Award of the Arbitrator which was issued pursuant to a collective bargaining agreement proceeding in this matter is reprinted as the Appendix to this Brief in Opposition ("Arb. Award App.").

II. APPLICABLE STATUTES

In addition to the statutes quoted in the Petition, pp. 1-3, the following statutes also are applicable to this case:

> **Qualified individual with a disability**. The term "qualified individual with a disability" means an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires. . . . 42 U.S.C. § 12111(8).

x x x

> **Retaliation**. No person shall discriminate against any individual because such individual has opposed any act or practice made unlawful by this chapter or because such individual made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this chapter. 42 U.S.C. § 12203(a).

III. STATEMENT OF THE CASE

As found by the District Court:

> Ball-Foster's ["BFG"] Waxahachie, [Texas], plant manufactures glass bottles. Prior to his injury, [Steve Middleton "Middleton"] was employed as a floor person/apprentice operator in the part of the plant where molten glass is formed by

> machines into bottles, known as the "hot end"; the "cold end" is the part of the plant where the bottles are inspected, put into boxes, stored in a warehouse, etc. Prior to becoming a floor person/apprentice operator, [Middleton] worked at various jobs in the cold end. Pet. App. 6.

On May 30, 1996, Middleton suffered a back injury on the job, and then later took an extended medical leave of absence for surgery and recovery/rehabilitation. R, Vol. 2, 464-68. Middleton returned to work on January 5, 1998. R, Vol. 2, 489. Thus, Middleton was absent due to his back injury for over fifteen (15) months. Shortly after his return, Middleton continued to suffer health problems. He was off work for two (2) days in January, 1998, and then for two (2) weeks in February, because of the side effects of pain medicine. R, Vol. 3, 501-02. On March 2, 1998, Middleton changed his "treating doctor" to Charles Osborn, a chiropractor. R, Vol. 3, 503. It is significant that, when he first started treating Middleton, Osborn's medical opinion was that his work restrictions were *permanent*. R, Vol. 3, 504.

Thus, on March 27, 1998, Osborn wrote an "Employee's Work Limitation Slip" on which he stated that Middleton had *permanent* limitations. He also recommended a "badge change," which would require a job reassignment from the hot end floor person/apprentice operator position. R, Vol. 3, 518, 538, 557-62. Osborn testified that what he meant by the word "permanent" was "lasting forever." The "badge change" recommendation meant "switching [Middleton] to a light duty position . . . altering [his] job status." R, Vol. 3, 538, 556, 562-63. At an arbitration hearing,[1] Middleton reemphasized that this March

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1. Like all bargaining unit employees at BFG's Waxahachie plant, Middleton is represented by the Glass, Molders, Pottery, Plastics & Allied Workers Union, AFL-CIO, CLC (the "Union"). On October 16, 1998, the Union filed a grievance on Middleton's behalf, alleging as contractual violations the actions made the subject of this Petition; *i.e.*, "[D]id the Company violate the collective (Cont'd)

27 restriction was *permanent* with respect to his floor person/ apprentice operator job, although he believed some of the "cold end" jobs were possibilities. R, Vol. 3, 453. Further, in his Answers to BFG's First Set of Interrogatories, Middleton stated: "On or around March 27, 1998, I was released to work [on] *permanent* light duty." R, Vol. 3, 576 (emphasis added).[2]

On April 15, 1998, Middleton filled out a "Statement of Claim . . . During *Total* Disability." R, Vol. 3, 579 (emphasis added). Significantly, Osborn stated on the second page of this form that: (a) Middleton was "totally disabled" "for his regular occupation," and (b) he would "*never*" be "able to resume . . . work" for "his regular occupation." R, Vol. 3, 180 (emphasis added). Osborn testified that this meant that Middleton was totally disabled from performing his former duties. R, Vol. 3, 539-40, 564-66.[3] Significantly, Middleton himself understood

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(Cont'd)
bargaining agreement by refusing to return [Middleton] to his employment as and when it did, following his injury at work on May 30, 1996?" Arb. Award, App. 2. Thereafter, an arbitration hearing was held before a mutually-selected neutral. On July 11, 2000, the Arbitrator issued his Award (Arb. Award, App. 1-34) which denied the grievance in its entirety (Arb. Award, App. 34).

2. Middleton argues that when he was given his first "limitation slip" from Osborn in March, 1998, there were "cold end" jobs he could have performed. Pet. 6, 21-24. His "proof" for this contention is a "Declaration" which Middleton tendered to the District Court. Pet. App. 43-55. However, in this Declaration, Middleton never explains how, if he was not at the plant, he possibly could know what jobs needed to be filled (if any), whether his physical limitations were consistent with any open job requirements, whether he had seniority to get those jobs, or how long BFG needed someone to perform them. In short, Middleton's "evidence" is nothing of the sort.

3. Middleton alleges that Osborn's reason for stating on the form that Middleton would never be able to perform his old job was because "BFG had refused to return [him] to that position." Pet. 6. However, BFG had not definitely "refused" Middleton anything at that time, but if

(Cont'd)

that the work restrictions which Osborn placed upon him were *permanent*, meaning that they would last "forever." R, Vol. 2, 435-36, 498-99.

On or about May 8, 1998, Osborn signed a second "Employee's Work Limitation Slip." R, Vol. 3, 600. Instead of the "permanent" restrictions and "badge change" recommendations, which were an integral part of the first such "limitation slip" dated March 27 (R, Vol. 3, 518), this new one alleged that the limitations were "temporary for 8 weeks," and there was *no* "badge change" recommendation.[4] Julia Kirchner ("Kirchner") (BFG's Human Resources Manager) was concerned and suspicious about this second "employee's work limitation slip."[5] As Kirchner put it, it was

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(Cont'd)

it had, it would only be because of what *Osborn* earlier had stated. In addition, the form said nothing about such "company refusal," so there was no way for BFG to know that Osborn meant anything other than exactly what was on the form. Finally, as the Arbitrator concluded, Osborn was "something less than credible" as a witness. Arb. Award, App. 31.

4. Middleton claims that Osborn's "new restrictions" meant he could perform his old "hot end" job if another employee assisted him, and that he could also do a "light job" in the "cold end." Pet. 6-7. The "factual" basis for this assertion is his Declaration (Pet. App. 49) but said assertion is controverted by the new "limitation slip" which says no such thing (the evidence shows that Osborn's after-the-fact "explanation" for these entries on the form were not conveyed to BFG until months later). Further, Middleton's Declaration is nothing more than his own conclusions – not facts.

5. Middleton argues that, with these restrictions, he could have worked in the cold end or, with someone performing an essential job function, his old position in the hot end. Pet. 7. This ignores the fact that the restrictions expressly stated that Middleton was to be confined to a light duty position. BFG told Middleton when he brought his first "Employee Work Limitation Slip" that there were no such jobs available, but that he would be called "when a job suited to his position was open." Pet. 6.

"unordinary [sic] that he had this miraculous change in condition, that it was now temporary." R, Vol. 3, 590.[6]

Thus, by early August 1998, BFG faced the following undisputed facts: (1) Middleton, who had been off work for a continual one year and three month period, was unconditionally released to return to work in early January, 1998; (2) he then almost immediately missed work on two occasions (both times for medication problems, the longest of which lasted two (2) weeks); (3) in March, 1998, Middleton was placed under medical restraints by Osborn who was of the opinion that Middleton's work restrictions were permanent and that he should be given a different job; (4) this evaluation changed dramatically and unexplainedly after Middleton was told of his ineligibility for permanent disability benefits;[7] and (5) Osborn's new recommendations were, first that Middleton's limitations were "temporary for 8 weeks," later for "6 weeks," and later still for another "8 weeks." R, Vol. 3, 518, 602-03. Each of these "limitation slips" placed strict restrictions on the physical activities which Middleton could perform.[8]

On August 10, 1998 (which was shortly before the last "limitation slip" was to expire), Kirchner wrote Osborn a letter in which she stated:

> *It is our understanding that Steve Middleton still has certain restrictions that prohibit him from*

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6. Middleton attempted to paint Kirchner as uncaring, or even discriminatory because of these remarks (Pet. 8). However, as discussed below, the District Court found that Kirchner's caution and concern were "reasonable."

7. Osborn never provided a coherent explanation for this sudden diagnosis change. Under these circumstances, Middleton's attempt to paint this dramatic reversal in Osborn's diagnosis as simply a case of his condition improving is absurd. Pet. 25-26, n. 10.

8. Kirchner testified to her understanding that these "8-6-8" week references meant that thereafter Middleton would be *unrestricted*. R, Vol. 3, 593.

> *returning to his regular job as floor person.* We would like to ascertain whether he would be able to safely perform a different job in our plant with his current limitations. R, Vol. 3, 604 (emphasis added).

Kirchner then enclosed descriptions for certain "cold end" jobs.[9]

Osborn's reply, dated August 20, did not state that Kirchner's above-emphasized understanding concerning Middleton's floor person/apprentice operator job was incorrect. Rather, with no discussion or elaboration, he listed five cold-end jobs which he thought Middleton could do, and a sixth regarding which Osborn was uncertain. R, Vol. 3, 619.[10] On September 3, Kirchner responded to Osborn and

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9. Middleton criticizes BFG because this letter was sent "almost five months after Middleton's initial release to return to work. . . ." Pet. 8. This ignores the fact that, up until that time, Middleton had been under temporary "light duty" work restrictions, but there was no need for such in the plant. Middleton also overlooks the fact that Kirchner was the one who initiated the steps to get Middleton cleared for a return to duty of some kind. It was reasonable for Kirchner to wait until the end of Middleton's restrictive period before she began this effort.

10. Middleton claims that BFG could, and should, have brought him back to work in some light duty position prior to his reinstatement in the Summer of 2000. Pet. 11-12, 21-23. In so asserting, Middleton relies upon his own Declaration (Pet. App. 48-49) in which he stated that he had worked several light duty jobs in the past. However, there is no evidence in the record that any employee of BFG ever worked on a light duty job for more than one or two weeks. Further, these assignments are infrequent and on an "as needed" basis only. R, Vol. 3, 598, 644-45. In an attempt to remedy Middleton's lack of any meaningful evidence on the "light duty" issue, he points to the arbitration testimony of two BFG employees. Pet. 11-12, 123-24. However, the first witness could recall but three occasions in the previous two and one-half (2 ½) years where injured employees were given light duty jobs, and none that lasted more than two weeks. R, Vol. 4, 755-59. The second witness only could

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stated that BFG needed more information than what was provided in his August 20 letter, such as weight restrictions, range of motion, and physical activity limitations.[11] She added that BFG wanted an independent "second opinion from our own doctor," and asked that Osborn prescribe a Functional Capacity Evaluation ("FCE") from Baylorworx, BFG's regular medical provider. R, Vol. 3, 620.

On or about September 14, 1998, Middleton called Kirchner and stated that he did not want Baylorworx to perform the requested FCE. Instead, he asked that one be done by Sargent Injury Rehabilitation. Kirchner, who was unaware that Osborn in fact was an *employee* of Sargent, agreed. R, Vol. 2, 529-30, 542, 592-93. When she later got the Sargent FCE, it was obvious to Kirchner that this was *not* the independent second opinion which she had hoped to receive, and which she had stated in her September 3 letter she needed. R, Vol. 3, 593-95, 620. Rather, the FCE was signed by Osborn, the very chiropractor whose "first" opinion needed to be confirmed.[12] A short time after she got Osborn's FCE, Kirchner unsuccessfully attempted to reach Osborn by

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recall two instances of employees ever working light duty jobs. R, Vol. 4, 786. Under these circumstances, BFG cannot be faulted for failing to create light duty work for the twenty-two (22) weeks covered in Osborn's various "limitation slips," or thereafter. Further, Middleton totally fails to present any evidence that there was an actual light duty need in the plant which would have extended for longer than the two or three brief periods referred to at the arbitration, or that he had more seniority than the employees who actually got such temporary work (assuming that any did).

11. Middleton alleges that this request for more details is evidence of discrimination. Pet. 9. However, it was reasonable for Kirchner to expect to receive more than a terse listing of positions, with no elaboration.

12. Osborn acknowledged that he was the one who reviewed the raw data for Sargent and decided what was to go into the FCE. R, Vol. 3, 527-28.

phone. On November 5, 1998, she wrote him a letter and stated that there appeared to her to be "some contradictions between [Middleton's] restrictions [discussed in the FCE] and the physical demands of the above job." Kirchner therefore asked for clarifications. R, Vol. 3, 595-96, 629. Later, Osborn took a tour of the plant[13] and, on January 20, 1999, he wrote Kirchner and said that Middleton could return to the floor person/apprentice operator position "*provided he does not have to change out the cores on the molds himself.*" Additionally, Osborn noted that there were some cold end jobs which Middleton could do.[14] R, Vol. 3, 630 (emphasis added).

Kirchner then arranged for Cathleen Moore of Baylorworx to come to the plant to conduct a "job site assessment" of both hot and cold end jobs for Middleton.

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13. Middleton relies upon arbitration testimony from a local union officer to the effect that Kirchner stated in a grievance meeting that BFG wanted Osborn to make a plant tour "to be sure [Middleton] could safely perform [the job]." Pet. 10. However, this was a highly justifiable statement.

14. Middleton contends that sometime "after touring the plant [Osborn] came to believe that Middleton could perform the floor person job because it was a lighter job than he had envisioned (and it became lighter [sic] after he learned that the molds did not have to be changed in whole pieces)." Pet. 10-11, 21 n. 8. He made the same argument before the District Court, which found that Middleton's "contention [was] unavailing." Pet. App. 31. Thus, Middleton has presented no evidence that Osborn ever told BFG "why . . . he placed the mold changing restriction on him." *Id.* Further, on some molds the pieces broke down into 24-pound parts, but others had heavier separate components. Pet. 11, n. 3; *see also* R, Vol. 4, 914. Thus, there are parts which clearly were over the 25-pound restrictions put on Middleton by Osborn, and the rest were so close that the difference was negligible. Finally, Middleton does not say *when* Osborn made the "discovery" that the molds came apart in pieces. It is undisputed that, prior to the mid-April, 2000 arbitration hearing, Osborn never informed BFG that he had become aware of this fact or that it might make a difference in his opinion.

After the assessment, Moore concluded that changing molds was an essential floor person/apprentice operator job function (R, Vol. 3, 631-32, 636), an assertion to which Middleton readily has agreed. R, Vol. 2, 422, 496-97. On March 8, 1999, Kirchner wrote Middleton, told him that BFG had conducted a "formal job analysis," and said that it wanted to "match [his] ability with the essential functions of the job" in the cold end. For this purpose, she requested that he sign an attached "Release of Medical Information" which would allow BFG to "release the information on [his] FCE to the third party [Baylorworx] so an accurate comparison [could] be made." R, Vol. 3, 638.

Instead of receiving such a release, on April 12, 1999, Kirchner got a letter from Middleton's attorney threatening a lawsuit. Middleton's attorney also criticized BFG for wanting a release that would "authorize [it] to share [Middleton's] confidential medical information with a 'third party,'" and questioned why BFG was "unwilling to accept the opinion of Dr. Osborn." R, Vol. 3, 640. However, contrary to this letter from counsel, as well as to Middleton's arguments in his Petition (Pet. 10), Osborn admitted that under the circumstances it was reasonable for Kirchner to ask that an FCE be conducted. R, Vol. 3, 531-32, 543. He further admitted that the Sargent FCE was not an "independent second opinion." R, Vol. 3, 544-46. Osborn acknowledged that the FCE would be confusing to a layperson, and that Kirchner could not be faulted for having concerns and for not accepting the FCE as "gospel from [him]." In fact, Osborn conceded that Kirchner "had a right" to question the FCE, "absolutely." R, Vol. 3, 547-50. Middleton mentions none of these facts in his Petition.

On April 21, BFG's counsel wrote Middleton's attorney a reply explaining, among other things, that because "Osborn has made . . . contradictory statements" which included "on more than one occasion stating that Middleton would never be able to perform the function of the Floor Person position,"

BFG wanted a "second opinion on Mr. Middleton's abilities." R, Vol. 3, 642-43. *Middleton's counsel never responded to this letter.*

On July 19, 1999, Todd Glawe (Kirchner's replacement as Human Resources Manager) wrote Middleton stating that there had been a recall from layoff in the cold end, and that he then had seniority[15] for one of those jobs but:

> We must ascertain which jobs you are currently able to safely perform. For this reason, the Company requests that you have a [FCE] performed by the Company physicians. R, Vol. 3, 652.[16]

Later, BFG dropped its request for a new FCE and, for several months following this July 19 letter, the parties communicated concerning BFG's request for Middleton to release his Sargent FCE to Baylorworx for its review. R, Vol. 3, 655-57. The last letter from BFG on this subject was one to Middleton's counsel dated October 5, 1999.

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15. Regarding the seniority issue, Middleton has presented no evidence to rebut the Arbitrator's finding that "until this letter was sent, Middleton did not have sufficient seniority for a position in the cold end." Arb. Award, App. 17. Prior to that date, the plant was in layoff status. In this regard, Middleton cannot rely upon the arbitration testimony of one union witness because this person admitted that he only "approximately" knew what Middleton's seniority was. Significantly, this witness also stated that Middleton's seniority, as he knew it to be, would have been insufficient to have protected him from layoff during the relevant time period. R, Vol. 4, 784-85. Therefore, the District Court clearly was correct in concluding that: (1) "there is no showing that [Middleton] was not given a job that a more junior employee received;" and (2) "the evidence is insufficient to show Middleton's proper order in being recalled." Pet. App. 34.

16. The only response to this July 19, 1999, request was an August 23 letter from Middleton's attorney to BFG's counsel stating that BFG's job-related communications with its employee Middleton was "a violation of the Cannon of Ethics." R, Vol. 3, 653. On August 24, BFG's new counsel responded and refuted these assertions. R, Vol. 3, 654.

It asked simply that Osborn confirm that Middleton's physical condition "is unchanged since the [FCE]" and that a release be executed:

> permitting us to show the FCE to Baylorworx so that they can compare your client's physical limitations with their assessment of the essential functions of the job. These documents should obviate the need for a physical examination and will expedite Mr. Middleton's return to work. R, Vol. 3, 658.

Middleton's attorney never responded to this letter. However, during and following, Middleton's deposition on June 13, 2000, a dialogue ensued that eventually satisfied BFG's desire for permission to give the Sargent FCE to Baylorworx. The end result was that a few weeks later, on July 26, 2000, an offer was made to return Middleton to a cold end job. He accepted and is working at the plant today. R, Vol. 3, 665.[17]

IV. ARGUMENT: REASONS FOR DENYING THE WRIT

1. THE "QUESTIONS PRESENTED FOR REVIEW" PROFFERED BY MIDDLETON ARE PREMISED UPON "FACTUAL" ASSERTIONS THAT WERE REJECTED BY THE COURTS BELOW

Middleton's "Questions Presented for Review" assume as "fact" such assertions as "[BFG] thwarted [Middleton's] return to work" (Question 1); "[BFG] prohibit[ed] [Middleton] from working even through [Middleton and Osborn] maintain that [Middleton] is otherwise qualified" (Question 2); etc. However, each of these factual allegations were found *against* Middleton in the courts below. Middleton's factual premise also is undercut by the testimony

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17. Middleton implies that BFG's ultimate success in getting Middleton back on the job was a result of his filing the instant lawsuit. Pet. 27. However, suit was filed on April 28, 1999, fifteen (15) months before the requested release finally was obtained.

of Osborn, the "physician" upon whom Middleton relies throughout his Petition. Osborn acknowledged that: (1) it was reasonable for BFG to ask that an FCE be conducted; (2) the Sargent FCE was not the "independent second opinion" that BFG had requested; (3) the FCE in which Osborn participated would be confusing to a layperson and BFG should not have accepted it as "gospel from [him];" and (4) BFG "had a right" to question the FCE "absolutely." R, Vol. 3, 531-32, 543-50.

Due to these admissions and the other facts in this case, it is not surprising that the Fifth Circuit affirmed the Opinion and Order of the District Court, which found in part that:

> [Middleton] delayed in responding to [BFG's] requests, and quarreled with whether a release had been given but refused to simply grant a new release. [BFG] initiated [Middleton's] eventual return to work in the cold end. Pet. App. 39.

As further found by the District Court: (1) it was "reasonable for [BFG] to desire medical evidence of [Middleton's] capacity to work in his previous job or any other job within the plant;" (2) BFG's "reluctance to accept the opinion of Dr. Osborn is entirely reasonable in light of his abrupt change in diagnosis of [Middleton] from permanently disabled to temporarily restricted from work;" (3) "[i]t was reasonable for [BFG] to suspect that the change in diagnosis might have resulted from Dr. Osborn's knowledge that [Middleton's] benefits application had been denied;" (4) BFG "was justified in seeking a second independent opinion and had ample reason to do so;" and (5) BFG "frequently initiated the correspondence between the parties, indicating a willingness to resolve the questions of Middleton's fitness to work." Pet. App. 37-38.

Additionally, the arbitrator heard the testimony of numerous witnesses, including Middleton, Osborn and Kirchner. The Union was represented by an attorney at the

hearing, whom Middleton acknowledged "did a wonderful job." He also admitted that the Union itself "did all it could to represent [Middleton's] interests in that arbitration." R, Vol. 2, 438-39.[18] It is significant to the instant appeal that, while less diplomatic than was the District Court, the Arbitrator agreed with it regarding whose fault it was that Middleton had not been reinstated into a plant job:

> When [Middleton's] personal attorney refused to allow [his client's] FCE to be studied by the therapist at Baylorworx, or to allow him to be examined by the Company doctor, that attorney – and not the Company – has kept [Middleton] from returning to work at some job in the Plant for which he is qualified, and for which his seniority will permit.
>
> x x x
>
> It is my opinion and finding that had it not been for the obstructive and uncooperative position taken by the Grievant's personal attorney, the Grievant would have been returned to work long before this time.
>
> x x x
>
> I have found that the Company tried to find a way to safely return the Grievant to work, while

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18. In *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974), this Court ruled that, while not preclusive, arbitral awards under a collective-bargaining agreement "may be admitted in evidence" in a subsequent proceeding. *Id.* at 60. The weight to be given such an award depends, among other things, on issue similarity, the fairness of the arbitration hearing, and the adequacy of the record. *Id.* at 60, n. 21. In the instant matter, the grievance involved whether BFG violated the collective bargaining agreement by not putting Middleton back to work when he wanted, and the arbitration hearing lasted two full days. In a thorough decision (Arb. Award, App. 1-34), the Arbitrator denied the grievance.

> satisfying itself that he would not re-injure himself when allowed to work at certain jobs. It was the Grievant's personal attorney who did "everything within its [sic] power to block . . . Mr. Middleton's return to work." Arb. Award, App. 27-28, 30-31.

Some of the delay about which Middleton complains was due to the fact that, from late March until late August 1998, Middleton's health care provider restricted his work activities to "light duty," which BFG did not have available at the time. Then, shortly before the last work restriction written by Osborn was to expire, BFG asked him to advise whether Middleton could perform certain "cold end" jobs, but Osborn's reply was simply a listing of certain of these jobs with no information about any restrictions which Middleton might have with respect to them.[19] In addition, the FCE which Osborn performed said in one place that Middleton could work a variety of jobs, but in another stated that he was "restricted on a repetitive basis" from performing every physical task for which he was tested.

Subsequent to Osborn's plant tour, BFG had Baylorworx conduct an analysis of the cold end jobs. BFG then asked Middleton to sign a release so that the FCE could be shown to Baylorworx for comparison with the requirements of these positions. Not only did Middleton not comply with this request, but in an April 9, 1999, letter, his counsel chastised BFG for even asking that Middleton "authorize [Defendant] to share his confidential information with a 'third party.'" R, Vol. 3, 640-41. This response was a clear rejection of BFG's reasonable request. The subsequent letter written to Middleton's lawyer by BFG's counsel, which explained the reasons for BFG's concerns, went unanswered.

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19. Osborn's reply contained no explanation whatsoever of Middleton's physical capabilities and, for this reason, BFG told Osborn it wanted more information, as well as a second opinion. However, BFG never received a second opinion because the subsequent FCE was performed by a company for which Osborn worked as an employee and it was signed by him.

BFG's July 19, 1999, letter to Middleton regarding the layoff recall in the cold end of the plant only resulted in contentious correspondence between counsel, the last of which was from BFG's attorneys and consisted of simply a request for a release for the Sargent FCE, and also a statement from Osborn "confirming that Mr. Middleton's condition is unchanged since the [then one-year old FCE]." R, Vol. 3, 658. There was *no* response to this letter.

When Middleton and his counsel learned that BFG wanted the release, they could have done one of three things. First, they could have complied, even if they thought it was unnecessary. Second, if they believed that earlier "releases" provided the requested authorization, they could have so stated.[20] However, they did *neither*. Instead they took the third option, which in some cases was to refuse to comply with the requests, and with regard to the letters from BFG's counsel of April 21 and October 5, 1999, to ignore them completely. Clearly, the District Court was correct in its findings, quoted above, that BFG was warranted in being suspicious of Osborn and careful in making certain that Middleton's return to work would not result in additional injury. Also, the District Court and the Arbitrator were exactly right in assigning blame for the resulting delay.

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20. In attempting to excuse the conduct of his counsel and chiropractor, and to cast the blame on BFG for the delay in Middleton's returning to work, Middleton argued before the courts below (and he may in a Reply to this Response) that BFG should have given the FCE to Baylorworx without a specific release. Middleton argued that because, in discovery, he had signed an authorization for BFG to obtain medical records from his providers, and also because he had signed some releases for BFG's insurance company, BFG did not "need" a release before giving the FCE to Baylorworx. However, an authorization to get medical records *from* a third party is not license to give such records *to* another third party. Also, Middleton never produced these documents for the lower courts' consideration. Moreover, Middleton ignores the contradictory fact that, in the very first letter which his counsel wrote to BFG, his lawyer took BFG to task for even seeking an authorization to "share [Middleton's] confidential medical information." R, Vol. 3, 640-41.

2. MIDDLETON WAS NOT "DISABLED"

In order to be "disabled" within the meaning of the ADA (and thus to come under its protections), an individual must suffer a physical or mental condition that "substantially impairs" one or more "major life activity; have a record of such impairment; or be regarded as having one." 42 U.S.C. § 12102(2); *see Brangdon v. Abbott*, 524 U.S. 624, 631 (1998). Not all "impairments" are serious enough to be statutory disabilities. *See Toyota Motor Mfg. Ky., Inc. v. Williams*, 122 S. Ct. 681, 690-91 (2002). An impairment which would qualify as a "disability" is one that:

> prevents or severely restricts the individual from doing activities that are of central importance to most people's daily lives. The impairment's impact must also be permanent or long-term. *Id.* at 685.

Middleton claims that he was "substantially limited" in his major life activities as a result of his impairment, including such things as *excessive* driving, walking, jogging, and lifting weights. Pet. 18, n. 7. The only factual support for this assertion comes from his osteopath, who also said that Middleton could not "walk a golf course." R, Vol. 4, 794.[21] Under these facts the

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21. As found by the District Court, "there is no evidence that jogging is a major life activity, many people who cannot jog are not disabled. There is no evidence to support [Middleton's contention] that the inability to walk a golf course constitutes a disabled condition." Pet. App. 24. Likewise, as determined by the courts below, the fact that, according to a letter from Middleton's osteopath (R, Vol. 4, 797), Middleton cannot drive more than 25-30 miles at a stretch does not render him disabled. Pet. App. 24-25. Further, Middleton has admitted that, even with his physical limitations, he is able to take 30-minute walks in the morning, do odd jobs around the house that require no heavy lifting, dig holes while working part time on a house-remodeling crew, etc. R, Vol. 2, 440-43. Also, as discussed above, it is undisputed that Middleton has been working at the plant for the past two years.

District Court clearly was correct in: (1) agreeing with BFG's "common sense approach that an inability to perform [the above-described] activities *to excess* is a common trait of all people," and (2) finding that "walking golf courses," "jogging," etc., are not major life activities. Pet. App. 24-26. Also, the Fifth Circuit was justified in affirming these findings. Such findings and conclusions with respect to driving, walking, jogging, playing golf, etc. are precisely the kinds of activity that this Court has found were *not* "of such central importance to most people's daily lives that they establish a . . . disability as a matter of law." *Toyota*, 122 S. Ct. at 694.[22]

Even though this Court has never ruled that "working" is a "major life activity" under the ADA (*see Toyota*, 122 S. Ct. at 692-93), throughout his Petition Middleton assumes that it is and that the courts below misapplied the law on this issue. However, to the extent that Middleton has proffered proof that his condition interfered with work, such falls far short of proving a substantial limitation. To the contrary, Middleton has contended throughout that he could do *any* of the disputed jobs. Obviously, if his condition would allow him to perform such jobs he does not have substantial limitations in the "major life activity" of working.

Moreover, Middleton's highly questionable "medical" evidence does not prove that he was substantially limited with respect to working. Thus, depending on which medical record is consulted, and at what time, Middleton had numerous, often changing, work restrictions, none of which substantially limited his ability to work within the meaning of the ADA. For example, his work restrictions included a 25-pound lifting limitation, but many lower courts have held that the inability to lift heavy objects is *not* a substantial limitation on working, or on any other major life activity.

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22. The physical limitations possessed by the Petitioner in *Toyota* included dancing, gardening, and driving long distances. *Id.*

See, e.g., Gillen v. Fallon Ambulance Serv., Inc., 283 F.3d 11, 22 (1st Cir. 2002); *Lusk v. Ryder Integrated Logistics*, 238 F.3d 1237, 1241 (10th Cir. 2001); *Gutridge v. Clure*, 153 F.3d 898, 900-901 (8th Cir. 1998); *Thompson v. Holy Family Hosp.*, 121 F.3d 537, 540 (9th Cir. 1997); *Williams v. Channel Master Satellite Sys., Inc.*, 101 F.3d 346, 349 (9th Cir. 1996); *Ray v. Glidden Co.*, 85 F.3d 227, 229 (5th Cir. 1996). The rationale behind these universally-held opinions is that:

> [I]f a restriction on heavy lifting were considered a substantial limitation on a major life activity, then the ranks of the disabled would swell to include infants, the elderly, the weak, and the out-of-shape. Congress obviously did not mean to extend the protections of the ADA to every physical impairment that precluded the performance of some particularly difficult manual task. *Gillen*, 283 F.3d at 22-23 (citing *Toyota*, 122 S.Ct. at 691).[23]

Yet, the only arguably significant physical restriction placed upon Middleton by Osborn that conceivably could "substantially limit" the "major life activity" of working, was the above-discussed one of not lifting more than 25 pounds. This restriction was relevant only to the "hot end" job which Middleton held prior to his injury. However, assuming that working is a major life activity, "substantially limits" means that an individual is restricted in the ability to perform either a class of jobs or a broad range of jobs in various classes as compared to the average person having comparative training, skills, and abilities. If an employee is unable to perform only a few particular jobs or tasks, he/she is *not* substantially limited in the major life activity of working. *See Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 491-92 (1999).

23. Significantly, as found by the District Court (Pet. App. 23-24), Middleton did not contest BFG's argument that the inability to lift twenty-five (25) pounds was not substantially limiting.

It cannot be disputed that there is a myriad of other manufacturing jobs, including ones at BFG in the cold end, that do not require lifting over 25 pounds or the other restrictions placed upon Middleton. Indeed, Osborn is on record as believing that Middleton could perform various cold end jobs (and he has been doing so since July, 2000). As a result, he was *only* limited in one specific job, *not* a broad range or even a class of jobs, and thus was not "substantially limited" in working. Therefore, Middleton was not disabled within the meaning of 42 U.S.C. § 12102(2)(A).[24]

Finally, acknowledging that it was a "close question," the District Court concluded that a jury could believe that BFG "regarded" Middleton as disabled based upon its seeking further medical information. Pet. App. 28-29. In direct contradiction, when the District Court rejected Middleton's ADA retaliation claim, it expressly found that it was "reasonable" for BFG to have: (1) asked for medical evidence of Middleton's abilities; and (2) questioned "the opinions of Dr. Osborn." Indeed, "[BFG's] request [for additional information] was not intended to unduly obstruct [Middleton's] return to work." Pet. App. 37-38. Therefore, it is clear that the District Court gave Middleton more of a benefit of a doubt on the "regarded as" issue than he was entitled to, as the Fifth Circuit realized when it found that BFG did not perceive Middleton as disabled, because "the inability to perform a particular job does not constitute a substantial limitation on the major activity of working." Pet. App. 2 (citing *Toyota*).

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24. The District Court found that "[Middleton] cites no evidence that [his] record differs at all from his contentions of disability." Since the Court ruled that Middleton was not disabled, it properly concluded that he had no record of disability. Pet. App. 27. *See Pryor v. Trane Co.*, 138 F.3d 1024, 1028 (5th Cir. 1998). *See also Coldwell v. Suffolk County Police Dept.*, 158 F.3d 635, 645 (2d Cir. 1998), *cert. denied*, 526 U.S. 1018 (1999).

This Fifth Circuit finding was appropriate because the evidence in this case shows clearly that the focus of BFG's dealings with Middleton and Osborn was directed to various cold end jobs (since Middleton's previous hot end position was physically unavailable to him). As Middleton himself admits, as early as his April 15, 1998 application for permanent disability benefits, Kirchner was of the view that "the validity of the claim should be questioned since there were other types of work Middleton could perform." Pet. 6. In BFG's efforts to get Middleton back to work, Kirchner's August 10, 1998 letter to Osborn listed several cold end jobs which she wanted Osborn to evaluate based upon Middleton's physical abilities. Further, Kirshner arranged for Baylorworx to come to the plant to do an assessment of the cold end jobs. BFG's efforts to get a release, which Middleton and/or his attorney stonewalled, were intended to provide a comparison between his physical abilities and those positions.

It is clear that BFG simply did not know what Middleton's condition was *vis-à-vis* the physical demands of any of the jobs, and its efforts to find out were constantly frustrated, as discussed at length above. In sum, even if BFG did think that Middleton could not safely perform the hot end job, since it was willing to place him in the cold end (which it ultimately did) such belief did not constitute "regarding" him as disabled. *See Sutton*, 527 U.S. at 492-93 (regarding employee as precluded from one job is *not* perceiving a "substantial limitation").[25] *See also Toyota*, 122 S. Ct. at 693; *Murphy v. United Parcel Serv.*, 527 U.S. 516, 523 (1999) ("to be regarded as substantially limited in the major life activity of working, one must be regarded as precluded from more than a particular job").

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25. Middleton argues that if BFG was willing to place him in other jobs, he "should have been permitted to return to work long before August 2, 2000." App. 19. The short response to this is that the key to that door always was in *Middleton's* hands, but he consistently refused to unlock it.

3. MIDDLETON WAS NOT A QUALIFIED PERSON WITH A DISABILITY

Middleton contends that BFG violated the ADA because (assuming he was disabled) BFG failed to make "reasonable accommodations" for his "disability." Pet. 20-22. *See also* 42 U.S.C. §§ 12111(8)-(10). Here again, however, Middleton relies upon alleged "facts" which were found against him by the courts below.

Based on these facts, the District Court correctly concluded that, even if Middleton was "regarded as" disabled, he also must be a "qualified individual with a disability." Pet. App. 30. A "qualified individual" with a disability is a person who can perform the essential functions of his job with or without reasonable accommodations. *See Sutton*, 527 U.S. at 478. It is undisputed that changing molds is an essential function of Middleton's hot end job, but the solution proposed to BFG by Osborn, *i.e.*, assigning someone else to perform this task clearly is *un*reasonable. Pet. App. 30. *See Turco v. Hoechst Celanese Corp.*, 101 F.3d 1090, 1093-94 (5th Cir. 1996) (the law requires that the employee be able to perform the essential job functions, not *almost all* of them, or most of them). *See also Chandler v. City of Dallas*, 2 F.3d 1385, 1393 (5th Cir. 1993) (an otherwise qualified person is one who is able to meet all of the program's requirements in spite of his disability).

As he did before the courts below, Middleton argues here that it would have been "reasonable" for BFG to have assigned an upkeep person to assist him in the mold change essential function, and he asserts that he received such assistance on occasions in the past. Pet. 21. However, Middleton fails to mention that, even when the plant had an upkeep on each of the four (rotating) shifts, an upkeep person was not always available for such assistance, and since all but one upkeep position was eliminated in a 1999 reorganization, no such assistance thereafter would have been

available to Middleton or anyone else, except during very limited times. R. Vol. 3, 672-76. Accordingly, Middleton simply is wrong in this reasonable accommodation argument, as found by the District Court (Pet. App. 30-31) and affirmed by the Fifth Circuit.[26]

Also without merit is Middleton's argument that Ball-Foster failed to reasonably accommodate him by giving him light duty work in the cold end of the plant. Pet. 22-24. Middleton cannot defeat summary judgment on this point because he has no evidence that there were any light duty assignments which were available to him, which he could perform, and for which he had seniority.[27] Further, BFG was under no duty to create a light duty position. *See School Board of Nassau County v. Airline*, 480 U.S. 273, 289 n. 19 (1987).[28]

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26. *See Maziarka v. Mills Fleet Farm, Inc.*, 245 F.3d 675, 681-82 (8th Cir. 2001) ("an employer is under no obligation to reallocate the essential functions of a position that a qualified individual must perform"); *Hanson v. Henderson*, 233 F.3d 521, 523 (7th Cir. 2000) (an employer need not "manufacture a job that will enable the disabled to work despite his disability"); *Benson v. Northwest Airlines, Inc.*, 62 F.3d 1108, 1114 (8th Cir. 1995) (employer does not have a duty to eliminate essential job function).

27. In *U.S. Airways, Inc. v. Burnett*, 122 S. Ct. 1516, 1523-24 (2002), this Court held that a seniority system like that of BFG "ordinarily" trumps an employer's obligation to transfer an "individual with a disability" into a position for which the person's seniority was inferior to that of another employee. The possible exception to this rule which the Court articulated was where the evidence showed that the seniority system had been disregarded in the past. There are no such facts here.

28. *See also Turco*, 101 F.3d at 1094 (employer need not create light-duty position); *Allen v. Georgia Power Co.*, 980 F. Supp. 470, 477-78 (N.D. Ga. 1997) (employer was not required to create permanent light-duty position for plaintiff); *Hershey v. Praxair, Inc.*, 969 F. Supp. 429, 435 (S.D. Tex. 1997) (employer is not required to create general light-duty clerical position to accommodate employee

(Cont'd)

4. ASSUMING THAT BFG WAS REQUIRED TO DO SO, IT ENGAGED IN AN "INTERACTIVE PROCESS"

Middleton claims that summary judgment was inappropriate because BFG "nullified the ADA's interactive process." Pet. 27-28. The Equal Employment Opportunity Commission ("EEOC") has promulgated regulations concerning "reasonable accommodation" under the ADA. Thus, 29 C.F.R. § 1630.2(o)(3) states:

> To determine the appropriate reasonable accommodation it may be necessary for the [employer] to initiate an informal, interactive process with the qualified individual with a disability in need of the accommodation. This process should identify the precise limitations resulting from the disability and potential reasonable accommodations that could overcome those limitations.

Because the language "may be necessary" is permissible and not mandatory, and assuming the regulations were adopted by the Courts, they would not create independent liability for failing to engage in dialogue with an employee in an attempt to find reasonable accommodation. *See, e.g., Willis v. Conopco, Inc.*, 108 F.3d 282, 285 (11th Cir. 1997) (plaintiff has the burden of showing reasonable accommodations and the employer cannot be found liable "merely for failing to engage in the [interactive] process itself"); *White v. York Int'l Corp.*, 45 F.3d 357, 363 (10th Cir. 1995) (EEOC regulations only recommend that an interactive process occur, and only after the employee shows that reasonable accommodation is available).

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with physical restrictions); *Puckett v. Porsche Cars of N.Am., Inc.*, 976 F. Supp. 957, 967 (D. Nev. 1997) (employer was not required to create permanent light-duty position), *aff'd*, 165 F.3d 917 (9th Cir. 1998); *Rochford v. Cheshire*, 979 F. Supp. 116, 121-22 (D. Conn. 1997) (plaintiff's request for creation of new light-duty position was unreasonable).

In this case, even though it was not required by law or regulation to do so, BFG clearly engaged in an interactive process. When Middleton presented BFG with the "permanent" light duty and job change note from Osborn, no "interactive process" was necessary. Middleton never has presented proof that at the time there was an actual need for light duty in the plant, permanent or temporary. Similarly, when Middleton later submitted his series of "temporary light duty job" notices from Osborn, which (collectively) covered a period of twenty-two (22) weeks, any attempt at an "interactive process" with Middleton also would have been futile because BFG did not need such work to be done.[29]

A short time before Middleton's last "temporary light duty" restriction expired, it was *BFG* that initiated discussions with Osborn concerning which cold end jobs would be compatible with his physical restrictions. When Osborn failed to enlighten BFG with anything other than a terse listing of positions, it was *BFG* that continued the dialogue with Osborn, which included asking that an independent second opinion be obtained. When Osborn later submitted an FCE, which clearly was not an independent second opinion, BFG arranged for Osborn to tour the plant. At around that same time, BFG paid for Baylorworx to make an evaluation of Middleton's old job in the hot end, as well as several positions in the cold end.

BFG's efforts to get Middleton back to work continued with its request that he execute a release so that Baylorworx could consider which jobs best suited his abilities. Instead of cooperation, however, BFG received a threatening letter from Middleton's counsel, with an admonition to BFG for even seeking to "share [Middleton's] confidential information

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29. BFG cannot be faulted for failing to create a six (6) month "light duty" position for Middleton when there is no evidence that any other employee had ever come close to receiving such an assignment. *See Holbrook v. City of Alpharetta*, 112 F.3d 1522, 1528 (11th Cir. 1997); *Turco*, 101 F.3d at 1094.

with a 'third party.'" Subsequent efforts by BFG to put Middleton back to work in a job he safely could perform were frustrated. It was not until after Middleton's June 2000 deposition that BFG got the permission it had been seeking for well over a year for it to show the FCE to Baylorworx. Middleton returned to work within a few weeks after such permission was obtained.

As found by the District Court, as well as by the Arbitrator, the fault for the delay which Middleton experienced in returning to work *cannot* be put upon BFG. Rather, the fault is that of Middleton and/or his chiropractor or counsel. Under these circumstances, BFG can not be held liable. *Templeton v. Neodata Serv., Inc.*, 162 F.3d 617, 619 (10th Cir. 1998) ("[a]n employer cannot be expected to propose reasonable accommodation absent critical information on the employee's medical condition and the limitations it imposes"); *Steffens v. Stephan Co.*, 144 F.3d 1070, 1073 (7th Cir. 1998) ("because [plaintiff] failed to hold up her end of the interactive process by clarifying the extent of her medical restrictions, [defendant] cannot be held liable for failing to provide reasonable accommodations"); *Buck v. University of Wisconsin Bd. of Regents*, 75 F.3d 1130, 1136 (7th Cir. 1996) (accord).

5. MIDDLETON WAS NOT RETALIATED AGAINST

Middleton's Petition does not raise retaliation as one of the "Questions Presented for Review." Nor does he quote the ADA retaliation provision, 42 U.S.C. § 12203(a) as an "Applicable Statute." However, in the "Argument" portion of his Petition, Middleton asserts that he established "a *prima facie* case of ADA retaliation." Pet. 24. Middleton argues that he made out a *prima facie* case because of BFG's alleged delays in bringing him back to work, as well as when "BFG nullified the interactive process." Pet. 25.

Clearly, however, Middleton has no proof of a causal connection between his exercising any ADA right and the

events of which he complains. For this reason, the District Court was correct in concluding that it could not:

> [D]iscern any attempt at retaliation against [Middleton]. [BFG] had a legitimate concern about the safety of Middleton and the liability of [BFG] should Middleton be hurt again in a job for which he was not qualified. Pet. App. 37.

See also Shirley v. Chrysler First, Inc., 970 F.2d 39, 42 (5th Cir. 1992) (the employer must have taken the adverse employment action because the plaintiff engaged in protected activity, *i.e.*, the employer must have had a retaliatory motive); *Jones v. Flagship Int'l*, 793 F.2d 714, 724 (5th Cir. 1986), *cert. denied*, 479 U.S. 1065 (1987) (accord). There simply is no proof here that Ball-Foster had any retaliatory motive, or that it was guided by any goal other than a desire to make certain Middleton could perform the various job functions. In short, notwithstanding Middleton's argument to the contrary, there is no proof that BFG acted in anything other than a "reasonable," non-retaliatory manner. Pet. App. 37-39.

6. THE FIFTH CIRCUIT DID NOT MISAPPLY *TOYOTA*

Toyota was decided subsequent to the Decision and Order of the District Court, but prior to that of the Fifth Circuit. Middleton argues that the Fifth Circuit misapplied *Toyota* for several reasons, including that the Lower Court's ruling: (1) means that "every employer [can] refuse to permit any disabled employee from returning to work by simply claiming that the employee cannot work" (Pet. 13); (2) there simply is no basis for the Fifth Circuit's application of *Toyota* to cases involving "regarded as" disability (Pet. 14); and (3) "the Fifth Circuit's declaration that, based upon *Toyota*, an inability to perform a particular job does not substantially limit the major life activity of working is nonsensical and constitutes a major error in the law." Pet. 15. However, it is clear that: (1) Middleton's criticisms of the Fifth Circuit have their genesis in a factual assumption that BFG was responsible

for the delay in his return to work, when the facts, the findings of the courts below, as well as the Arbitrator's decision squarely are to the contrary; (2) *Toyota* in fact involved "regarded as" allegations; and (3) the only "nonsense" and "major legal error" in this case are that of Middleton, and not the Fifth Circuit.

Thus, as stated above, Middleton's factual allegations leading to his proffered conclusion that BFG discriminated against him because of delay were flatly rejected by the District Court (and affirmed by the Fifth Circuit), as well as by the Arbitrator. Accordingly, the litany of horrible miscarriages of justice suggested by Middleton (*e.g.*, that the lower court's decision "transform[s] the interactive process under the ADA [to] a means to effectuate rather than prevent discrimination" (Pet. 16)) simply have no application to this case.

Further, Middleton overlooks the fact that *Toyota* raised allegations that the plaintiff was "regarded as having an impairment." *See Toyota*, 122 S. Ct. at 687. With respect to whether the plaintiff was "disabled" or "regarded as disabled," the Court in *Toyota* stated that it had not previously found that "working" was an "major life activity." Nevertheless, the Court reaffirmed its ruling in *Sutton* (527 U.S. at 491-92) that, assuming working was such an activity, "a claimant would be required to show an inability to work in a 'broad range of jobs' rather than a specific job." *Toyota*, 122 S. Ct. at 693-94.

Regardless of whether Middleton was "disabled" or "regarded as" such, his argument that the Fifth Circuit's reliance upon *Toyota* is "nonsense" and a "major error in the law" is nothing more than nonsubstantive hyperbole. Further, it ignores the fact that *Sutton* involved solely the "regarded as" portion of the ADA's "disability" definition. 527 U.S. at 487. ("[Plaintiffs] contend only that respondent mistakenly believes their physical impairments substantially limit them

in the major life activity of working"). *Sutton's* companion case likewise involved only the "regarded as" issue. *Murphy*, 527 U.S. at 521-22. In sum, the Fifth Circuit was faithful to *Toyota*, as well as to *Sutton* and *Murphy*, when it held that Middleton's "inability to work a particular job [the one in the hot end] does not constitute a substantial limitation on the major life activity of working." Pet. App. 2.

7. THE FIFTH CIRCUIT DID NOT "IGNORE" MIDDLETON'S EVIDENCE

In furtherance of his attack on the Fifth Circuit, which he accuses of having a

> proclivity for deviating from the basic summary judgment burdens of proof as set forth in Fed. R. Civ. P. 56 and by this Court in cases such as *Reeves v. Sanderson Plumbing Prod. Inc.*, 530 U.S. 133 (2000) (Pet. 16-17),

Middleton claims that the Court of Appeals "ignored" his evidence on a number of issues. Pet. 14-16, 27. However, Middleton points to nothing specific in the Fifth Circuit's *per curiam* opinion that constituted that Court's giving his "evidence" anything other than the consideration it was due.

Thus, the Fifth Circuit affirmed the District Court "essentially for the reasons given" by it in its "comprehensive Memorandum Opinion and Order." Pet. App. 2. Indeed, that Memorandum Opinion and Order occupies thirty-six (36) pages of Middleton's Appendix. Throughout that decision, the District Court constantly cited Middleton's summary judgment evidence (*see, e.g.*, Pet. App. 7-8, n. 6-13; 32-34, n. 76-83), and discussed and analyzed that evidence, but ultimately ruled that no reasonable jury could hold for Middleton on the essential points of his being "otherwise qualified" or the victim of retaliation. Pet. App. 35, 39. In so doing, it is abundantly clear that the District Court concluded that Middleton had failed in his burden to show that the nondiscriminatory reasons put forth by BFG were false; and

also it found that Middleton's case on the "regarded as" issue was (to put it charitably) weak. Under these circumstances, the District Court's granting of summary judgment, and the affirmance by the Court of Appeals, was justified. *See Sanderson*, 530 U.S. at 148-49.

Middleton's real complaint seems to be that the Fifth Circuit did not issue a lengthy, detailed decision, but instead treated the matter in a *per curiam* opinion. However, as stated by this Court:

> We, of course, agree that Courts of Appeals should have wide latitude in their decisions of whether or how to write opinions. That is especially true with respect to summary affirmance. *Taylor v. McKeithen*, 470 U.S. 191, 194, n. 4 (1972).[30]

Accordingly, Middleton's contention that the *per curiam* opinion by the Fifth Circuit is proof that his evidence was not "considered" is baseless.

8. THE PETITION DOES NOT RAISE ANY ISSUE WARRANTING REVIEW BY THIS COURT

Rule 10 of this Court gives several reasons why it might grant a Writ of Certiorari, none of which applies here. Thus, Rule 10(a) states that certiorari might be granted if the Fifth Circuit's decision had conflicted with that of another Court of Appeals. Middleton does not contend that this is the case. Rule 10(b) (ruling of a state court) is inapplicable on its face. As to Rule 10(c), BFG has demonstrated above that the Fifth Circuit's *per curiam* order does not conflict with *Toyota* or any other relevant decision of this Court. Furthermore, it is abundantly clear from the discussion above

30. *See also United States v. Garza*, 165 F.3d 312, 314 (5th Cir. 1999) ("a litigant's right to have all issues considered and ruled on by the appellate court does not equate to a full written opinion on every issue raised"); *Furman v. United States*, 720 F.2d 263, 264 (2d Cir. 1983) ("there is no requirement in law that a federal appellate court's decision be accompanied by a written opinion").

that Middleton's Writ is substantially based upon his version of the facts, which were found against him by the Courts and the Arbitrator below. Thus, this is one of those cases where "a petition for a writ of certiorari is rarely granted." Rule 10 (final paragraph).

V. CONCLUSION

For the reasons stated above, summary judgment was appropriate on all points raised by Middleton in his Petition. Also, because Middleton's Writ has as its foundation assertions of fact which were decided against him, his Petition for a Writ of Certiorari should be denied.

WHEREFORE, Respondent Ball-Foster Glass Container Company, L.L.C. respectfully prays that Petitioner's Writ of Certiorari be denied and that the judgments of the Fifth Circuit and the District Court be affirmed.

Respectfully submitted,

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APPENDIX — AWARD OF ARBITRATOR DATED JULY 11, 2000

FMCS #99-0929; GR. #125-98-35

GRIEVANT: STEVE MIDDLETON

GRIEVANCE: COMPANY REFUSAL TO RETURN TO WORK

DATE OF INJURY: MAY 30, 1996

DATE OF GRIEVANCE: 10-16-98

IN THE MATTER OF ARBITRATION BETWEEN

BALL-FOSTER GLASS CONTAINER CO., L.L.C.

AND

GLASS, MOLDERS, POTTERY, PLASTICS AND ALLIED WORKERS INTERNATIONAL UNION, LOCAL 125

HEARING HELD ON APRIL 10 AND 11, 2000, AT HOLIDAY INN, DE SOTO, TEXAS, WITH RICHARD M. KOBDISH AND DAVID R. DEITCHMAN, ATTORNEYS AT LAW, REPRESENTING THE COMPANY; ADRIENNE A. BERRY, ATTORNEY AT LAW, REPRESENTING THE UNION AND THE GRIEVANT; BEFORE BARNETT M. GOODSTEIN, ARBITRATOR SELECTED THROUGH THE PROCEDURES OF THE FMCS, WASHINGTON, D.C.

Appendix

ISSUE

DID THE COMPANY VIOLATE THE COLLECTIVE BARGAINING AGREEMENT BY REFUSING TO RETURN THE GRIEVANT, STEVE MIDDLETON, TO EMPLOYMENT, AS AND WHEN IT DID, FOLLOWING HIS INJURY AT WORK ON MAY 30, 1996? IF SO, WHAT SHALL BE THE APPROPRIATE REMEDY THEREFOR?

BACKGROUND

For the past 35 years, the Company has manufactured glass bottles for the beer industry, at its Waxahachie, Texas Plant. Until recently, the parties operated under separate Collective Bargaining Agreements for the Production and Maintenance employees (who work at [sic] what is called the Cold End) and for the Automatic Machine Department (for employees who work in what is called the Hot End). For the 3-year Agreement, effective April 1, 1999, the parties negotiated a single Contract for both P & M Workers and for the Automatic Machine Department.

At the present time, there are approximately 140 employees at the facility, approximately 120 of whom are in the bargaining unit. This same Union has represented the bargaining unit employees during its entire period at this location. The Company has other locations, all over the country, all under the same Collective Bargaining Agreement.

The Grievant began working for the Company on December 5, 1988. He suffered an on-the-job back injury during 1994, but returned to work after treatment. On May

30, 1996, while doing his regular work assignments, as a Floorperson, the Grievant testified he heard his neck or back pop; he felt his neck and back tingle, and the impulses ran down his legs. He continued working, completed his shift, and then continued working at his regular classification until his injury became too aggravated. Subsequently, he left work on a medical leave.

He was released to return to work on June 28, 1996, by Eddie Joslin, M.D., with no restrictions. However, on August 30, 1996, he had to leave work again, due to his back injury. On August 30, 1996, the Grievant filed another Report of Injury with the Company, describing his May 30 injury. In this Report, he stated that, "[M]y back popped just like before. This has been something thats (sic) haunted me for 2 yrs." He wrote that he had reported both back strains to Tom Sharp, Jr., a Management Representative. At that time, the pain in his back became so intense that he went to the Emergency Room at the local hospital. At the hospital, the Grievant was given an MRI. Apparently, that MRI showed a spinal herniation, causing the doctor there to require the Grievant to take off from work.

On September 3, 1996, C.J. Garrison, M.D., who is associated with Baylorworx, a service of Baylor Health Care System, gave the Grievant a Release to Work, with no restrictions — full duty. However, on September 16, 1996, he was diagnosed with a herniated disk, and placed on medical leave again. On January 15, 1997, he underwent surgery for his herniated disk, and was then off on extended medical leave, while recuperating from this surgery.

Appendix

On December 17 and 18, 1997, personnel at Baylorworx performed a Functional Capacity Evaluation on the Grievant. The FCE concluded that the Grievant "demonstrated limited tolerance to work in lifting, carrying, the elevated position, crawling, kneeling, static crouching, and repetitive squatting." At the same time, it showed that the Grievant gave maximum effort in taking the test; that his performance was consistent; that he showed minimal physical pain; that he could safely handle the job at hand; that he has smooth, coordinated movements, but suffered muscle fatigue in lifting items from the floor, and that he could tolerate work in the forward, bent position whether sitting or standing; whether stair climbing, step ladder climbing, or in balance tasks.

On December 1, 1997, the Grievant's then physician, John A. Bousquet, III, M.D., wrote that, "I agree with present plan to evaluate for return to work and with impairment rating." He did not return to work until January of 1998, but the record indicates that might have been too early, under the circumstances. On March 13, 1998, Dr. Bousquet wrote to the Company, as a result of the Grievant's having missed two days of work in January. His letter states that, "[D]uring that time, Mr. Middleton was taking prescription medication for pain. Taking this medication can impair the performance of an individual and create an unsafe situation in the workplace."

On March 2, 1998, the Grievant had filed a request with the Workers Compensation Commission to change doctors. He stated, then, that he was "dissatisfied with care." At that time, he changed from an M.D. to the care of a Chiropractor, Charles R. Osborn, D.C., as his primary care physician.

Thereafter, the Grievant saw Dr. Osborn frequently, between March 23, 1998, and the date of the hearing, at which hearing, Dr. Osborn testified on behalf of the Grievant. Beginning on March 23, 1998, and continuing until June 30, 1999, Dr. Osborn treated the Grievant, and kept a running Patient's Progress Report for each of the said visits.

Reports of each visit show the Grievant to be complaining of low back pain, and still experiencing discomfort. On May 20, 1998, the Doctor wrote that, "[T]he patient will have some permanent disability as a result of this condition and . . . was given a list or restrictions to follow." The last entry in this Union Exhibit No. 5, is dated June 30, 1999. It states, in part, "[T]he diagnosis is unchanged. The patient has been advised of the likelihood of future exacerbations of this condition and the need for future treatment. PLAN: The patient should return as needed to control pain. this [sic] patient will have to be treated with relief care, which is authorized by law, until the recommended medically necessary treatment can be authorized."

The evidence, introduced at the hearing, indicated that one Dr. Richard Raughton, a Doctor of Osteopathy, was brought in to the Grievant's case. His function was to prescribe and administer injections of pain medicine to the Grievant, that a Chiropractor is not legally allowed to do. He administered a number of such injections of pain medicine. It was further shown that Dr. Raughton subleases office space from Dr. Osborn, the Chiropractor and the two Doctors refer a number of patients to one another in their practices.

Appendix

On February 1, 2000, Dr. Raughton wrote "To Whom It May Concern," that he sees the Grievant every 3 weeks to a month, "for these acute exacerbations of pain which are relieved with injections of various types." At that time, February 1, 2000, Dr. Raughton wrote that, "[I]t should be noted that Mr. Middleton suffers from status post lumbar laminectomy pain with acute exacerbations of such."

However, on March 27, 1998, Dr. Osborn wrote an "EMPLOYEE'S WORK LIMITATION SLIP" for the Grievant. In that Report, Dr. Osborn restricted the Grievant to no lifting over 25 lbs; "no excessive bending, no heavy pushing or pulling." At that time, Dr. Osborn wrote on the Report that the noted limitation would be permanent, and he then recommended a job change for the Grievant. Obviously, Dr. Osborn believed then that the Grievant no longer could be a Floorperson, striving to become an Operator in the Hot End of the Plant.

On May 8, 1998, the Human Resources Manager at the Company, wrote a Memo to the File. It appears that, when the Grievant learned from Dr. Osborn that his injury would cause him to be permanently restrictions [sic] in the work he would be able to perform, he applied to the Company for Permanent Total Disability (PTD). The Memo to the File indicates that, "Steve Middleton is not eligible to apply for PTD. As mentioned in the contract, an employee must have ten (10) years of service before he is eligible to apply for PTD. Steve Middleton was hired on 12/5/88 and will not have ten years until 12/5/98."

Then, on the same date of May 8, 1998, Dr. Osborn prepared another EMPLOYEE'S WORK LIMITATION SLIP for the Grievant. On this Slip, Dr. Osborn again reiterated the same work restrictions he had shown on his March 27 Report. However, on this May 8 Report, he now shows the Limitations to be temporary, for a period of 8 weeks, instead of permanent, as shown on the March Report. Moreover, no longer does Dr. Osborn recommend a job change; that section of the Report is now ignored.

On June 25, 1998, Dr. Osborn prepared still another EMPLOYEE'S WORK LIMITATION SLIP for the Grievant. This Report is almost identical as the previous such Report. However, the period of temporary limitation has been [sic] changed from 8 weeks to 6 weeks from the June 25 date.

A month later, however, on July 27, 1998, Dr. Osborn prepared another Work Limitation Report for the Grievant. This time, with the same limitations as shown before, the time period for the temporary limitation was increased to 8 weeks from the July 27 date. However, the Patient Progress Report for the Grievant, kept by Dr. Osborn, shows a different result. On a July 22, 1998 visit, Dr. Osborn reported that the patient had reported decreased pain since the previous visit, and that "there has been great relief since last treatment; the last treatment helped considerably." The temporary limitation period was increased from 6 weeks during the June visit to 8 weeks during the July 27 visit, without any explanation of why the apparent discrepancy.

Article 33 of the CBA governing the Grievant's employment at the time of his injury, provides that an

employee disabled by an occupational injury, and who cannot work his regular job, "will be placed on any job acceptable to him which he is qualified to perform in line with his seniority (and qualifications). . . ." This is the provision that the Grievant alleges the Company has violated in not returning him to work when he received a Release To Work, with restrictions.

On August 10, 1998, the Company wrote to Dr. Osborn to the effect that the Company understands that the Grievant "still has certain restrictions that prohibit him from returning to his regular job as floorperson. We would like to ascertain whether he would be able to safely perform a different job in our plant with his current limitations." With that letter was enclosed a list of job descriptions that might be available for the Grievant, and the question to Dr. Osborn was to point out to the Company which of those jobs, if any, the Grievant could perform "with his current restrictions."

On August 20, 1998, Dr. Osborn responded that 6 of the listed jobs were all right for the Grievant to handle, and said nothing concerning the previously noted restrictions for any work. All of the jobs listed are in the Cold End of the Plant, and do not include the Floorperson or Operator jobs, both of which are in the Hot End. At that time, the evidence indicated that the Grievant did not have sufficient seniority to warrant any of the Cold End Jobs.

On September 3, 1998, the Company again contacted Dr. Osborn. It wanted Dr. Osborn to inform the Company how much weight the Grievant could lift and how often; what was his range of motion in safely lifting, bending, reaching,

squatting, etc.; and what limitations he has in standing, walking, static sitting, climbing stairs, etc. The Company informed the Doctor of its position "in not wanting to cause further injury to Steve Middleton, and this information will be vital in making our decision how to address this situation." In addition, the Company notified Dr. Osborn that it wanted a second opinion from its own doctor.

The letter requested that Dr. Osborn prescribe an FCE for the Grievant, to be done at Baylorworx in Waxahachie. About the middle of September, the Grievant called the HR Manager at the Company, and told her that he did not want Baylorworx to perform the FCE on him. Rather, he wanted Sargent Injury Rehabiliation [sic] to do the FCE. He had no confidence in Baylorworx since Dr. Garrison [sic], from there had released to him to work so long ago, with no restrictions of any kind.

However, neither the Company nor the Grievant then knew of the contractual employer-employee relationship of Dr. Osborn and Sargent's. The Company agreed that Sargent Injury Rehabilitation should do the FCE on the Grievant. It did, and subsequently sent the FCE Report, dated September 29, 1998, to the HR Manager at the Company.

On October 16, 1998, the Grievant filed his Grievance against the Company, that is the subject of this proceeding. In his Grievance, the Grievant alleged the violation by the Company of Article 33 "& any available Articles," of the CBA. The Grievance alleges that, "Steve has not been allowed to work after being evaluated and released." It asks that the Grievant "be made whole for all hours missed since

date of evaluation & be called to work in line with his seniority." It then shows the Union's Position: "After obtaining a Doctor's Release and taking the F.C.E. Steve is entitled to work certain jobs in line with his seniority."

On December 15, 1998, the HR Manager of the Company wrote to the Union, as the Company's Answer at Step 2 of the Grievance Procedure. The Company's Answer states: "Steve Middleton's work-related injury to his back resulted in permanent restrictions, and he is unable to perform his regular hot end job. It is the company's position that we do not offer light duty for employees with permanent restrictions." The Answer then indicates that the Company had an FCE performed on the Grievant to see if he could work any Cold End jobs. "The test results did not convince us that Steve could safely perform the jobs without restrictions." The Company requested clarification of the test results from the Grievant's doctor, but such information was not forthcoming from the said doctor. The Company concludes its Answer by notifying the Union that it "could not allow Steve to take a job in the cold end, as we did not want to risk having him re-injured." The Company again denied the Grievance.

On December 30, 1998, the Company responded to the Union, as its 3d Step Answer to the Grievance. This Answer notifies the Union that the Company is providing the Grievant's doctor with additional information so the doctor can assist the Company in determining which, if any, jobs in the Plant the Grievant could then qualify for and perform. The Grievant's doctor had agreed to visit the Plant in January,

observe the jobs being performed, and then agreed to reevaluate the jobs for the Grievant's return.

On January 13, 1999, the Union wrote to the Company, indicated that Dr. Osborn had visited the Plant to see what classifications the Grievant might be able to perform. "I am hopeful and confident that, when Dr. Osborn makes his report, we will know the classifications that the grievant can safely perform and he will be returned to work shortly, if his seniority entitles him to do so." Both parties were working to settle this matter to everyone's satisfaction.

Apparently, the parties continued to process the Grievant's Grievance, and continued to work to return him to a job at the Plant. On June 17, 1999, the Company wrote to the Union, in what it captions as a "Reply to 3rd Step Grievance." The Answer notes that the Grievant continues to request a return to his former position as a Floorperson. The Company noted that it is its policy to return an employee to work after an injury "as long as the employee can safely perform all essential functions of the job."

The Company then notes contradictions between the Grievant's FCE, and Dr. Osborn's release for him to perform several Cold End jobs. However, the Company pointed out to the Union that certain restrictions contained in the FCE "would make performing the job impossible or unsafe." The letter recites the fact that the doctor informed the Company that the Grievant could perform certain Cold End Jobs with no restrictions. However, the doctor did list certain restrictions that would apply of [sic] the Grievant were returned to the Floorperson job. The letter reiterates to the

Union that the Grievant did not, then, have sufficient seniority to be awarded any of the jobs in the Cold End. Moreover, since he could not perform his old job, without help from some other workers on the floor, the Company could not safely return him to that Floorperson job. The letter concludes that the Company refused to put the Grievant at risk of further injury by returning him to his former job, in which he cannot safely perform the essential functions. "We have taken all steps possible to investigate the possibility of returning Steve to his former job. Unfortunately, the results are not in his favor."

On June 24, 1999, the Company again wrote to the Union, and sent it chronological data on the career of the Grievant, including hire date, injury date, doctors care, release to return to work on several occasions, some with no restrictions, some with restrictions.

On September 14, 1999, the resolution of this Grievance still was being negotiated. The Company then wrote to the Union, reiterating its former position. He no longer was qualified to work as a Floorperson, and until July of 1999, his seniority did not permit him to work in the Cold End of the Plant. The Grievant had been contacted by the Company with a return to work letter. He was asked to contact the Company to arrange for his return to work at the Cold End. He failed to contact the HR Manager after his receipt of that letter.

Despite that fact, the Company agreed with the Union that, if the Grievant would report to Baylorworx for a "work step survey (as all recalled employees are required to do)

with a copy of his latest functional capacity test for Baylor Worx's review, we could begin the process for his return to work at the Waxahachie facility."

On September 16, 1999, the Area Director of the International wrote to the Company and stated that "there is nothing that changes my mind." At that point, arbitration was being considered. It then was processed to arbitration, where both parties agree it is properly before the arbitrator for a final decision.

On November 5, 1998, the Company wrote to Dr. Osborn, after Sargent Injury Rehabilitation had completed the FCE, and sent it to the Company. The Company notified Dr. Osborn that it had tried, unsuccessfully, to reach Ms. Stephanie Sargent, who was the Operator who had given the Grievant his test for the FCE. The letter notified the Doctor that it was trying to obtain accurate information "so that we can make an informed decision regarding Steve Middleton's ability to safely perform a job in our plant." The Company wrote to the Doctor that it had noted certain contradictions between "Steve's restrictions and the physical demands of the above jobs."

The Company wanted clarification of the Sample's [sic] FCE results "before we proceed any further with this issue." The Company subsequently learned that it was Dr. Osborn who told Stephanie Sargent what to put in the FCE, and who actually signed the Report itself. Also, it was determined at the hearing that Sargent's pays Dr. Osborn $2,000.00 per month for reading and interpreting the FCEs. Moreover, Dr. Osborn refers his patients to Sargent's for the performance

of the FCE work, and then he signs the FCEs as though he was the one responsible for the manner in which it was handled. Patients are not given any information concerning the business relationship between the two said entities. Nor was it the "second" opinion the Company had requested. This FCE appeared to do no more than mirror the conclusions and recommendations earlier made by Dr. Osborn to the Company.

However, the Company points out that the Tables in the FCE contradict the conclusions shown in the FCE Summary. The Tables, according to the Company, show a restriction on the Grievant to almost all the jobs listed as being available for the Grievant to handle. Moreover, the FCE uses terms such as "repetitive," without defining the term. And, according to the Company, it makes no distinction between Cold End and Hot End jobs.

The HR Manager tried to reach Stephanie Sargent, to discuss these apparent discrepancies with her, to no avail. So she contacted Dr. Osborn, to seek clarification from him. She received no clarification from Dr. Osborn. Thereafter, the HR Manager requested Dr. Osborn to visit the Plant, and determine, on site, which jobs the Grievant could handle, with his current restrictions. Dr. Osborn did visit the Plant, and examined the available jobs, and talked with the then-working Machine Operator. His visit lasted about 30 minutes, and he then wrote to the Company about the results of his visit.

Dr. Osborn informed the Company that the Grievant could again perform his job as Floorperson in the Hot End,

"if he does not have to change out the cores or the molds himself." The Grievant usually reported his job as that of Floorperson. However, on at least one occasion he reported his job to be that of Apprentice Operator. In either such job, the incumbent must change out the molds. He cannot have someone else working at the Plant do that for him. That function is one of the things called an "essential function of the job," by the Company. The incumbent must be able to perform all essential functions in order to hold the said job. The Grievant wanted the Company to provide someone to change the molds for him, as a reasonable accommodation, under the Americans With Disabilities Act. The Company declined.

There was no job at the Plant, in either the Hot End or the Cold End, that the Grievant could handle, with restrictions. He requested light duty work, until his restrictions were removed and he could perform the duties of his regular job without assistance from anyone else. He was told the Company has no light duty work, on a permanent basis, and his restrictions were designated as permanent, or as temporary, for 6 to 8 weeks. The Company has created light duty jobs for injured employees, but only up to a maximum of 2 weeks. The Union disagreed, and tried to show examples of other and longer light duty work for certain employees.

On March 8, 1999, the HR Manager wrote to the Grievant, and told him that the Company had had Baylorworx prepare a job site assessment, or formal job analysis, for it. She then wrote to the Grievant that the Company wanted to match his then-current abilities with the essential functions

of a job he could handle. She then enclosed a Release of Medical Information for the Grievant to sign and return to her. With that Release, she could send a copy of the Grievant's FCE to Baylorworx for Cathleen Moore, the Senior Occupational Therapist at Baylorworx, to evaluate. Then, she could compare it with her Job Site Analysis, and determine which, if any, of the available jobs the Grievant might be able to handle, with his restrictions.

The Grievant had filed suit against the Company, in Federal Court in Dallas, and had retained personal counsel to represent him in that suit. Neither the Union, nor the Union's counsel, was involved in the Grievant's said suit against the Company. The Grievant told the HR Manager that he could not sign the Release of his FCE to anyone, until he had talked with his attorney, and determined what he wanted him to do about it.

That attorney castigated the Company for going around him, directly to the Grievant, and refused to allow the Grievant to give his permission for the Company to show his FCE to any third party. The Company's counsel responded to the said attorney that the Company has the right to contact its own employees, without having to go through any attorney he might have. This is especially true, according to the Company's attorney, when the Company is attempting to return the employee to full-time employment.

Therefore, the Grievant refused to sign a Release so the Company could refer a copy of his FCE to Baylorworx for its examination and utilization in returning the Grievant to

work. The Company argued that, without this information, it could not determine whether the Grievant could be returned to work or, if so, for what job or jobs.

The Company attorney wrote to the Grievant's personal attorney, and explained to him why a second opinion was necessary for the Company. The Company alleged contradictions between the FCE and correspondence from Dr. Osborn, concerning the Grievant's ability to handle the work of Floorperson. That was the job that the Grievant had held, on a full-time, regular basis. That was the job (he termed it apprentice operator) that the Grievant wanted to return to work. In fact, at one time, Dr. Osborn had written to the Company that the Grievant never would be able to handle that particular job again, and requested a job change for him.

Before mid-July, 1999, according to the Company, the Grievant did not have sufficient seniority to qualify for any of the Cold End jobs. However, the Company contends that, even if he did have the seniority, the Company could not return him to such a job, since the Grievant never would sign the Release it requested.

The Company contends that it needed to send a copy of that FCE Report to Baylorworx, to match the Grievant's physical abilities with a Cold End Position for which he could qualify. The Grievant was notified that he was then eligible for one of the jobs in the Cold End. However, until it could match his restrictions, and the essential functions of the various jobs available, the Company could not safely place the Grievant in any one of the available jobs for fear of having him re-injure himself, or aggravate his existing injury.

Appendix

The Grievant's personal attorney responded by notifying the Company it had violated the Cannon of Ethics by going around him directly to his client. The Company attorney responded to the said attorney, and denied such a violation of the Cannons at all. Despite such a refusal by the Grievant's attorney, the Company continued to attempt to secure a Release from the Grievant for a copy of his FCE to be sent to Baylorworx.

On October 9, 1999, the Company wrote to the Grievant's attorney, and requested that he ask Dr. Osborn to confirm that the Grievant's physical condition had not changed since his FCE, and that the Grievant be allowed to sign a Release for the FCE to be sent to Baylorworx. That attorney never responded to the Company's said letter.

The evidence brought forward at the hearing seemed to acknowledge that the Grievant knew that he could not be returned to work until the Company doctor could examine him, or until he allowed a copy of his FCE to be sent to Baylorworx for evaluation. He did not so permit, and it appears he was not permitted by his attorney to sign a Release for his FCE or allow the Grievant to be examined by the Company.

Moreover, the evidence indicates that the Grievant's medical doctors (not Dr. Osborn, the Chiropractor) were giving the Grievant injections of certain drugs, and giving him prescriptions for drugs to give him temporary relief from the pain he was suffering, and, hopefully, to assist in curing the problem so the Grievant could return to work.

However, the evidence showed that certain side effects of the drugs the Grievant was taking, caused him to be drowsy and inattentive and, in fact, it was shown, could make it unsafe for the Grievant to work in, around or with machines or machinery. Moreover, when the Grievant was removed from one such drug (Soma), he suffered withdrawal symptoms that appeared to be dangerous in and of themselves.

Although the Company was unable to secure permission to show the Grievant's later FCE, made by Sargent's, the Company employed Ms. Cathleen Moore, the Senior Occupational Therapist from Baylorworx, to make a site assessment of the jobs at the Plant. This was for the purpose of determining which, if any, of the jobs (especially the Cold End jobs) the Grievant might be able to handle, with the restrictions placed on him by his health providers.

Ms. Moore found that changing the molds in the bottle-making machines (a Hot End job) is an essential function of the job of Operator or Floorperson. Moreover, she found that, due to the restrictions placed upon the Grievant, by Dr. Osborn, it would be difficult for him to handle most of the jobs in the Cold End. However, she did suggest that the Grievant take a 4-day muscle-strengthening program — at her Baylorworx — before returning to any job with the Company.

The Grievant did, in fact, begin such a strengthening program. However, for some reason not shown at the hearing, the Grievant discontinued his muscle-strengthening program before the end of the time scheduled for him to attend.

The reason could not have been because he was then called back to work by the Company, as the Company was waiting for him to finish such a program, and securing additional information from Dr. Osborn, before calling him back to any job.

The evidence indicated that the Grievant could not return to his Hot End job, unless the Company could furnish someone to change the molds for him, each time they needed to be changed to change the bottle size produced by the machine. This is an essential function of the job, and has to be performed by the incumbent of that position. The Grievant felt that the Company should make a reasonable accommodation for him by having an Upkeep employee, or another Floorperson, change the molds for him each time they required changing. The Company refused to do so, on the basis that the ADA does not require the Company to do that, as a reasonable accommodation.

At the hearing, it was learned that, at the time of the Grievant's back injury, the Company had 4 Floorpersons working in the Hot End, on each of the 4 Shifts each day. However, at the time of the arbitration hearing, the Company witness testified that the Company had cut back to only one Floorperson, and that was on the Day Shift, Monday through Friday. Thus, there would no longer be anyone available who could even do the Grievant's job of changing the molds.

Appendix

FINDINGS AND OPINION OF THE ARBITRATOR

The Union has alleged, in its Grievance, that the Company has violated Article 33 of the CBA, by not returning the Grievant to work when his doctor released him to return to his former job. Article 33 is styled, "Disabled Employees." Sec. 1. refers to those "disabled by reason of physical disabilities or infirmities." Sec. 2. refers to those "disabled by reason of occupational injury or illness and who is unable to work his regular job will be placed on any job acceptable to him which he is qualified to perform in line with his seniority (and qualifications). . . ."

Thus, it would appear that Sec. 1. was meant to cover those employees who are disabled under the definition of the ADA, and not to those who are injured while on the job. Sec. 2. then, is limited to those employees who are disabled as a result of their particular job with the Company. In my opinion, the two are mutually exclusive, and do not build upon each other.

I believe we are concerned, in this hearing, only with Sec. 2. of Article 33 (and Sec. 3. that provides for the Contract to be administered under the provisions of the ADA). The Grievant obviously is covered by Sec. 2 of this Article, since there is no dispute over the fact that he was injured while cleaning a bottle-forming machine in the Hot End of the Plant.

Sec. 2. is clear and unambiguous in providing that any employee injured on the job, "will be placed on any job acceptable to him which he is qualified to perform in line

with his seniority (and qualifications). . . ." The Union, in its well-reasoned Brief, argues that the Company is attempting to add conditions to the contractual right guaranteed the disabled employee. The Union argues that the Company "will" (must) return the Grievant to a job that is acceptable to him, and for which he is qualified to perform, if he has the seniority for that position.

The Grievant was a Floorperson (he says that is the same as an Apprentice Operator, since he has been learning to operate the bottle-making machines, and had completed from 2500 to 3000 of the necessary 4000 hours to become a journeyman Operator), when injured on the job. He has asked that he be returned to his former position (Floorperson/ Apprentice Operator), as that job is acceptable to him; he is qualified to perform it; and he has the seniority to handle that job, since he already was doing so before being injured.

The Union argues that there is no contractual requirement that the Grievant must satisfy "the individual whims of the Company's Human Resource Manager; or that the Grievant furnish the Company with an FCE or signed Releases; or that he submit to an additional physical examination. The contractual right belongs to the employee (acceptable to the employee). [sic]

The Union contends that the Grievant has repeatedly attempted to exercise his contractual right to be returned to his former job, but the Company has adamantly refused. The Company has no right to require additional prerequisites, before allowing the Grievant to return to his former position,

for that is not what the Contract provides. The Company should negotiate for changes in the Contract, and not try to change it in arbitration.

I would agree completely with the Union in this regard, if it were not for one thing. It is now undisputed that the Grievant need not be returned to his former job, by the Company, unless he has the same qualifications as before to handle that position now. The Grievant does not. In fact, his own treating health provider (Dr. Osborn) is the one who first placed the Grievant on permanent disability, and requested a job change for the Grievant, as he never again would be able to perform the job of Floorperson, or of Operator on the Company's bottle-making machines.

While it is true that, after the Company showed the Grievant that he was disqualified for the status of permanent disability with the Company, as he requested since he did not have sufficient seniority with the Company, Dr. Osborn changed his diagnosis of the Grievant. Thereafter, the doctor dropped the request for a job change from his Status Reports; made his diagnosis one of temporary disability; and variously noted different periods of temporary disability as 6 weeks; then 8 weeks; then 6 weeks again. Moreover, the doctor never removed the restrictions he placed on the Grievant originally, as to the amount of weight he could lift (or needing help to change the molds in the bottle-making machines); or of the restrictions on the Grievant of pushing, pulling, bending, stretching, reaching, etc.

In short, the Grievant was not the same person after his second injury, in 1996, and his back surgery in 1997, from

which he had not yet fully recovered at the time of the arbitration hearing. He still was seeing his Chiropractor for treatments, and his physician for pain shots, on a weekly, bi-weekly, or monthly schedule. He still was suffering with pain; he still was being medicated; and he still had work restrictions that disqualified him from any Hot End job, without help from co-workers who no longer are there to help him, even if they could have done so.

The Contract may provide that the Grievant be given any job that is acceptable to him, but it does not provide that he is his own doctor when it addresses jobs for which he is qualified to handle. The doctors who treat the Grievant determine whether he is physically qualified to do the required work; and the Company determines whether he has the skills required to so handle the said job (qualifications). The evidence clearly indicates that the Grievant no longer is physically qualified to perform all the essential functions of the Floorperson or Operator job in the Hot End of the Plant.

The Contract does not require that the Company provide the Grievant with an assistant, or helper, to perform the various essential functions of the job he no longer is able to perform himself. I find that the Grievant no longer is able or qualified to perform the job of Floorperson or Apprentice Operator, previously held by him.

The Union correctly admonishes me to follow the precise language of the Contract. That I must, and will, do. The Union argues that, "[T]he contract speaks for itself." That is true, and this Contract states that the Grievant will be placed on an acceptable job "which he is qualified to perform."

The language is clear. The Grievant, unfortunately, no longer is qualified to perform all the essential functions of the job of Floorperson/Apprentice Operator, with the restrictions placed on him by his health providers.

The Union correctly concludes that, "[I]f the language of the Collective Bargaining Agreement is clear and unequivocal, as it is in this case, the arbitrator should not give it a meaning other than that expressed." I agree, and I will not do so. The Union argues that, if I find the language of the Contract to be unambiguous, I should enforce the clear meaning of that language, even if the parties themselves disagree as to its meaning. Again, I completely agree. In fact, I believe I have done so in this case as shown by my Opinion here expressed.

The Union contends that I must rule only on my interpretation of the language of the CBA that gave rise to the issue before me. I have no authority to alter, modify, add to or subtract from any of the terms or provisions of the Agreement. I agree completely. Unfortunately, it may be that my interpretation of the meaning and intent of the provisions of Sec. 2. of Article 33 are not as the Union would like for me to find. For that, I am sorry. However, as the Union has shown, I can but interpret the words there negotiated by and between the parties; I cannot change them.

In my opinion, even if those weight, and other, restrictions, all were removed in one fell swoop, by his health providers, the Company still would have the right to require all the same tests it requires of any employee returning to work after having been off. Moreover, in the Grievant's case,

the Company is right in requiring a second opinion, from a more objective source, as to whether the Grievant can safely perform the duties of any job to which the Company might return him. After two back injuries, and a back operation, certain jobs may be more dangerous than other jobs, for the Grievant, and could aggravate the existing infirmity, or permit a reoccurrence. The Company should not be placed in the position of being the cause of a third back injury to the Grievant, while in its employ.

Moreover, Article 30 of the CBA is entitled "Weight Lifting." It provides that no employee shall be required to perform any job duties, when, in the opinion of the Union and Management, that job requires excessive "weight lifting." Certainly, if the Company cannot require any employee to perform any job that entails excessive weight lifting (the Floorperson and Operator's jobs), it can elect not to allow such employee to perform such work, if it believes that doing so might cause injury, or re-injury to that employee.

Until June of 1999, the Grievant did not have sufficient seniority to qualify for a position in the Cold End. After that date, his seniority allowed him to be placed in one of the jobs in the Cold End of the Plant. It is to his credit that the Grievant has fought long and hard to be able to return to work in some job that he could perform, and for which he had the seniority to be chosen.

However, the transcript of the tape recordings made by the Grievant of his conversations with the HR Manager of the Company, convinced me that the Company also was anxious to return the Grievant to some job with the Company.

However, those conversations convinced me that the Company was more concerned with the Grievant's safety, and the need to protect him from further injury, than it was in just satisfying his desire to be working again after such a long absence.

When the Grievant's personal attorney refused to allow the Grievant's FCE to be studied by the Therapist at Baylorworx, or to allow him to be examined by the Company doctor, that attorney — and not the Company — has kept the Grievant from returning to work at some job in the Plant for which he is qualified, and for which his seniority will permit. Article 4 of the CBA (Management Rights) gives the Company the right to establish "standards of production and performance by the employees on all machines and operations." This provision would give the Company the right to a second opinion, or to have the Grievant examined by its own physician, before allowing the Grievant to return to work, with restrictions on his ability to perform the job to which he is being returned.

The Union contends that the Company is arguing "that it is entitled to unwritten procedures that should relate to the application of Article 33." I disagree. I find that the Company has followed the mandates of the CBA by attempting to determine from a medical source better informed than Dr. Osborn whether the Grievant is capable of performing any particular job in the Plant, be it in either the Hot End or the Cold End, for which he has the seniority.

The Union and its counsel both have performed yeoman service in their attempts to get the Grievant back to work.

It is my opinion and finding that, had it not been for the obstructive and uncooperative position taken by the Grievant's personal attorney, the Grievant would have been returned to work long before this time, at some position in the Plant for which his qualifications and seniority would permit him to fill, taking into consideration his actual physical limitations and restrictions.

The Union argues that, simply because Dr. Osborn showed the Grievant's injury to have caused a permanent disability, and his inability to work his regular job again, permanent really does not mean forever. One's physical condition can change, and one no longer be permanently disabled. I wonder why Dr. Osborn did not tell that to the Grievant, instead of assisting him with his Application for Permanent Disability with the Company? Dr. Osborn certainly must have led the Grievant to believe that his injury had caused him to suffer a permanent disability. Why else would he have made application to the Company for such a status, with its consequent rewards?

The Union argues that, even the Company recalls employees to work after it has placed them on permanent layoff. That is true, of course, because it is covered in that manner in the Contract negotiated by the parties. Article 8 covers Seniority. Sec. 10. thereof covers "Permanent Layoffs," as follows: "During periods of reduced activity, making a reduction in the work forces necessary, the least senior employee will be laid off. Recall will be in reverse order." That is the Section to which the Union attorney referred in questioning the HR Manager about "permanent" layoffs. And that is the language negotiated by both parties to this arbitration hearing.

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The Union argues that, even with the permanent restrictions, the Grievant still was able to handle certain jobs at the Plant, in the Cold End. Therefore, Dr. Osborn must have meant that the Grievant was permanently disabled and unable to handle the job of Floorperson/Assistant Operator any longer. That must be why he fast wrote that the Company should change the Grievant's regular job, and give him a different one. However, that also changed, and Dr. Osborn led the Grievant to believe he could handle his former job — if someone else changed out the molds for him. To me, that is an admission that the Grievant could not handle the said job, in all its essential functions, alone. Rather, he needed help from co-workers in order to be able to hold the job that he faults the Company for not giving him.

The Union argues that the Company allowed other employees to work on light duty, but did not allow the Grievant to work even one day of light-duty work. The Company's response to this argument was that it did not allow any employee to have light duty work, if such work was to last more than 2 weeks. However, if an employee had been hurt, and was scheduled to return to his regular job within 2 weeks, the Company agrees that sit [sic] gave such employees certain light-duty jobs to fill while they were recuperating. The Company contends tha[illegible]ll employees on light duty were given some kind of work t[illegible] do: they did not sit in the break room and sleep or watch television.

The Union introduced into evidence a letter from an International Representative of the Union sent to the Company. That letter shows the Union's interpretation of what happened after the Grievance was filed on October 16,

1998. It accuses the Company of doing everything in its power to delay putting the Grievant back to work. I have found this not to be the case. In fact, I have found that the Company tried to find a way to safely return the Grievant to work, while satisfying itself that he would not re-injure himself when allowed to work at certain jobs. It was the Grievant's personal attorney who did "everything within its power to delay both the processing of this grievance and Mr. Middleton's return to work."

The letter states that the Grievant "should have been returned to the job of Floorperson in accordance with the report of Dr. Osborn." It was Dr. Osborn who fast reported to the Company that the Grievant was permanently disabled, and never again could fill the position of Floorperson. It was he who asked that the Grievant's job be changed from Floorperson. When he later changed his mind, and wrote that the Grievant could perform the Floorperson's job, he placed so many resrtrictions [sic] on that return to work that the Company could not meet all of them, and was not required to do so, under the terms of the ADA.

The Company was not required to provide an assistant to the Grievant, to do the work of changing the molds in the machines. That is an essential function of the job. If the incumbent is not able to handle all the essential functions of a job, by himself, he is not able to hold the job. The ADA does not require the Company to reasonably accommodate the injured employee, by giving him an assistant, or someone to do the part of the job he cannot do himself, or to perform any essential function of the job for him. Neither the Contract nor the ADA requires the Company to do that so the Grievant can hold the said job.

Appendix

The Union, in its Brief, argued that the Company introduced great quantities of irrelevant evidence, in an attempt to "misdirect" me in deciding the real issue involved. The Issue, as the Union reminds me is whether or not the Company violated the Contract by not returning the Grievant to work. My answer to that question has been, and is, that it was the Grievant's personal attorney who is responsible for requiring the Grievant to violate the Contract by not agreeing to permit the Company to seek the medical evidence needed in order to protect both the Grievant and the Company when the Grievant is recalled to some certain job at the Plant.

If the Grievant desires to seek his representation from his personal attorney, rather than from his Union, then it is the Grievant himself who must suffer the consequences. The Union did not choose the health providers for the Grievant. It was not the Union that deceived the Grievant into believing that his Chiropractor, his Doctor of Osteopathy, and his Sargent Injury Rehabilitation, all were separate, individual and distinct health providers, all seeking to benefit the Grievant and not themselves, jointly and severally.

The connection between and among all the Grievant's health providers, and the fact that the Grievant never was told by Dr. Osborn of the close business relationship among all the said health providers, leads me to the conclusion that the Grievant's leading medical witness is something less than credible as an expert witness. No matter how hard the Union attempts to fight for the Grievant, it cannot undo the damage done to the Grievant by himself in his choice of health providers and personal attorney, insofar as it affects this particular case.

Appendix

The Union argues that, "[T]he record before this Arbitrator does not establish any inability caused by medication on the part of Middleton as relates to performing the duties associated with various jobs in the plant." I disagree. The record before me indicates that the Grievant continually was given injections for pain, which injections may or may not have caused an impairment for certain kinds of work — unless the effect of the pain medicine wore off while the Grievant was performing his regular work assignments. However, the prescription drugs that were prescribed for the Grievant, including but not limited to Soma, together with the list of possible side effects of those drugs as introduced into evidence, leads me to believe that it was more than just possible that it was dangerous for the Grievant to be allowed to perform the duties of Floorperson while taking the said prescription drugs. He admitted, himself, that he never was made aware of the side effects of the medicine he was taking.

The Union argues that it is irrelevant that the Company preferred to have its own doctor make a determination as to whether or not it was safe to allow the Grievant to return to work, and be placed on a job that could endanger his safety, and the safety of those who worked around him. It is more relevant, according to the Union, that the Texas Workers Compensation Commission approved Dr. Osborn for the Grievant's treating health provider, and that the said Commission did not require the Grievant "to submit to such an examination or evalutaion [sic]."

The Company is bound by the Contract of the parties, and by the ADA and the laws of the United States and of

Texas. The Workers Compensation Commission is not a party to the Contract between the parties, nor does it control the actions of the Company under the terms of its said Contract. The actions of the Workers Compensation Commission do not establish any criteria for the Company to follow, or that would assist me in any way, in my making the decision I must make in this matter. It is an entirely different entity, separate and apart from requiring anything that must be interpreted by me in deciding whether the Company violated a negotiated Agreement.

The Union argues that the Grievant did not have to follow the "mythical obligation," as required by the Company, since such requirements are not contained in the CBA. The Union contends that, "[T]he Grievant has done everything required of him by the contract and by the Texas Workers' Compensation Commission. Steve Middleton is entitled to return to work immediately." I cnnot [sic] agree that the Grievant has done everything required of him by the Contract; I pass no judgment on whether he has done everything required of him by the Texas Workers' Compensation Commission, since such an issue is not before me; and I agree that he should be entitled to return to work immediately. Again, the only reason that he may not be working already is the fact that the Grievant's own personal atrtorney [sic] will not allow the Grievant to be examined, or have his medical records examined by an objective medical source, or a second opinion. To date, all it has is the opinion of Dr. Osborn, and that includes certain contradictory information that said doctor either cannot, or will not, elucidate.

Appendix

AWARD OF THE ARBITRATOR

The Issue: DID THE COMPANY VIOLATE THE COLLECTIVE BARGAINING AGREEMENT BETWEEN THE PARTIES BY REFUSING TO RETURN THE GRIEVANT TO EMPLOYMENT, AS AND WHEN IT DID, FOLLOWING HIS INJURY AT WORK? IF SO, WHAT SHALL BE THE APPROPRIATE REMEDY THEREFOR? is answered in the negative.

The Company did not so violate Article 33, or any other Article, of the Collective Bargaining Agreement between the parties. Therefore, the Grievance is Denied.

Barnett Goodstein
Arbitrator

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July 11, 2000